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Act XXIII of 1863 (Claims to Waste-lands), as modified up to 1st December, 1896	0 4 0	[1a.]
Act III of 1864 (Foreigners), as modified up to 1st September, 1900	0 3 0	[1a.]
Act VI of 1864 (Whipping), as modified up to 1st August, 1905	0 3 0	[1a.]
Act XVII of 1864 (Official Trustees), as modified up to 1st July, 1800	0 5 0	[1a.]
Act III of 1865 (Carriers), as modified up to 31st May, 1903	0 3 0	[1a.]
Act X of 1865 (Succession), as modified up to 1st July, 1800	1 8 0	[2a.]
Act III of 1867 (Gambling), as modified up to 1st January, 1905... ..	0 4 0	[1a.]
Act V of 1869 (Indian Articles of War), as modified up to 1st December, 1904	1 2 0	[3a.]
Act XX of 1869 (Volunteers), as modified up to 1st May, 1806	0 4 0	[1a.]
Act I of 1871 (Cattle Trespass), as modified up to 1st May, 1906	0 6 0	[1a.]
Act IV of 1872 (Punjab Laws), as modified up to 1st November, 1904	0 7 0	[1a.]
Act XV of 1872 (Christian Marriage), as modified up to 1st December, 1904	0 10 0	[2a.]
Act V of 1873 (Government Savings Bank), as modified up to 1st April, 1903	0 3 0	[1a.]
Act X of 1873 (Oaths), as modified up to 1st February, 1903	0 3 0	[1a.]
Act II of 1874 (Administrator General) as modified up to 1st July, 1890; with a list of Native States included within the Presidencies of Bengal, Madras and Bombay, respectively, for the purposes of the Act	0 11 0	[2a.]
Act IX of 1874 (European Vagrancy), as modified up to 1st December, 1901	0 6 6	[1a.]
Act XIV of 1874 (Scheduled Districts), as modified up to 1st October, 1895	0 6 0	[1a.]
Act XV of 1874 (Laws Local Extent), as modified up to 1st October, 1895	0 7 0	[1a.]
Act IX of 1875 (Indian Majority), as modified up to 1st May, 1906	0 2 0	[1a.]
Act of 1877 (Specific Relief), as modified up to 1st February 1904	0 11 0	[1a. 6p.]

	Rs.	A.	P.
Act III of 1877 (Registration), as modified up to 1st August 1905	0	11	0 [2s.]
Act VII of 1878 (Forests), as modified up to 1st December, 1903	0	10	0 [2s.]
Act XVII of 1878 (Ferries), as modified up to 1st June, 1902	0	6	0 [1s 6p.]
Act XVII of 1879 (Dekkhan Agriculturists' Relief), as modified up to 1st March, 1895	0	10	0 [2s.]
Act XVIII of 1879 (Legal Practitioners), as modified up to 1st May, 1896	0	7	0 [1s.]
Act VII of 1880 (Merchant Shipping), as modified up to 15th October, 1891	0	10	0 [2s.]
Act V of 1881 (Probate and Administration), as modified up to 1st July, 1890	0	12	0 [2s.]
Act XV of 1881 (Factories), as modified up to 1st December, 1904	0	5	6 [1s 6p.]
Act XXVI of 1881 (Negotiable Instruments), as modified up to 1st August, 1897	0	10	0 [1s.]
Act XVIII of 1881 (Central Provinces Land-revenue), as modified up to 1st March, 1905	1	2	0 [2s.]
Act II of 1882 (Trusts), as modified up to 1st June 1903	0	10	0 [1s.]
Act IV of 1882 (Transfer of Property), as modified up to 1st December, 1903	0	13	0 [2s.]
Act V of 1882 (Indian Easements), as amended by the Repealing and Amending Act, 1891 (XII of 1891)	0	8	0 [1s.]
Act VI of 1882. (Companies), as modified up to 1st August 1900	1	10	0 [2s.]
Act XII of 1882 (Salt), as modified up to 1st December 1890	0	6	0 [1s.]
Act XIV of 1882 (Code of Civil Procedure), as modified up to 1st December, 1899	3	0	0 [6s.]
Act XV of 1882 (Presidency Small Cause Court), as modified up to 1st June, 1906	0	10	0 [2s.]
Act V of 1883 (Indian Merchant Shipping), as modified up to 1st December, 1904	0	6	0 [1s.]
Act VIII of 1883 (Little Cocos and Preparis Island) as modified up to 1st October, 1902	0	1	3 [1s.]
Act XIX of 1893 (Land Improvement Loans), as modified up to 1st September, 1906	0	2	6 [1s.]
Act XXI of 1883 (Emigration) as modified up to 1st December, 1902	0	11	0 [2s.]
Act VI of 1884 (Inland Steam-vessels), as modified up to 1st July, 1891	0	0	0 [2s.]
Act VII of 1884 (Steam-ships), as modified up to 1st July, 1890	0	6	0 [1s.]
Act XII of 1884 (Agriculturists Loans), as modified up to 1st February, 1903	0	2	0 [1s.]
Act XVIII of 1884 (Punjab Courts), as modified up to 1st December, 1899	0	7	0 [1s.]
Act XIII of 1885 (Indian Telegraph), as modified up to 1st March, 1905	0	5	0 [1s.]
Act II of 1886 (Income-tax), as modified up to 1st April 1903	0	8	0 [1s. 6p.]

	Ra. A. P.
Act VI of 1886 (Births, Deaths and Marriages Registration), as modified up to 1st June, 1891 ...	0 6 0 [1a.]
Act XI of 1886 (Tramways), as modified up to 1st December 1903 ...	0 9 0 [2a.]
Act XIII of 1886 (Securities), as amended by Act XII of 1891	0 2 9 [1a.]
Act VII of 1887 (Suits Valuation), as modified up to 1st October 1904 ...	0 1 9 [1a.]
Act IX of 1887 (Provincial Small Cause Courts), as modified up to 1st December, 1900 ...	0 6 0 [1a.]
Act XIV of 1887 (Indian Marine), as modified up to 15th February, 1899 ...	0 8 0 [1a.]
Act V of 1888 (Inventions and Designs), as modified up to 1st July, 1903 ...	0 9 0 [2a.]
Act I of 1889 (Metal Tokens), as modified up to 1st April, 1904 ...	0 1 9 [1a.]
Act VII of 1889 (Succession Certificates), as modified up to 1st December, 1903 ...	0 5 6 [1a.]
Act X of 1889 (Ports), as modified up to 1st April, 1901 ...	0 11 9 [2a.]
Act XIII of 1889 (Cantonments), as modified up to 1st March 1895 ...	0 7 0 [1a.]
Act XV of 1889 (Official Secrets), as modified up to 1st April 1904 ...	0 3 9 [1a.]
Act IX of 1890 (Railways), as modified up to 1st June 1905 with an Index ...	1 2 0 [2a.]
Act X of 890 (Press and Registration of Books), as modified up to 1st December, 1903 ...	0 2 3 [1a.]
Act XII of 1891 (Repealing and Amending Act), shewing the Schedules as modified up to 31st May 1902 ...	0 12 0 [1a. 6p.]
Act XIV of 1891 (Oudh Courts), as amended by the Oudh Courts Act (1891) Amendment Act, 1897 ...	0 1 3 [1a.]
Act I of 1894 (Land Acquisition), with footnotes ...	0 7 0 [1a.]
Act VIII of 1894 (Tariff), as modified up to 1st February, 1906 ...	0 9 0 [2a.]
Act IX of 1894 (Prisons), as amended by the Burma Laws Act, 1898 ...	0 7 6 [1a. 6p.]
Act IX of 1897 (Provident Funds), as modified up to 1st April, 1903 ...	0 1 6 [1a.]
Act V of 1898 (Code of Criminal Procedure), as modified up to 1st April, 1903 ...	3 10 0 [8a.]
Act VII of 1899 (Petroleum), as modified up to 1st December 1904 ...	0 7 0 [1a.]
Act XIX of 1899 [Currency Conversion (Army)], as amended by Act VII of 1900 ...	0 1 0 [1a.]
Act III of 1900 (Prisoners), as modified up to 1st March 1905 ...	0 6 6 [1a.]
Act XV of 1903 (Extradition), as modified up to 1st December, 1904 ...	0 5 6 [1a.]
Regulation III of 1872 (Sonthal Parganas Settlement), as modified up to 1st October, 1899 ...	0 6 6 [1a.]
Regulation V of 1873 [Bengal (Eastern) Frontier], as modified up to 1st July 1903 ...	0 1 9 [1a.]
Regulation III of 1876 (Andaman and Nicobar Islands), as modified up to 1st February, 1897 ...	0 5 6 [1a.]

	Ra. A. P.
Regulation I of 1886 (Assam Land and Revenue), as modified up to 1st June, 1894	0 13 0 [2a.]
Regulation VI of 1886 (Ajmer Rural Boards), as modified up to 1st February, 1895	0 5 6 [1a.]
Regulation XIV of 1887 (Upper Burma Villages), as modified up to 1st April, 1891	0 5 0 [1a.]
Regulation V of 1893 (Sonthal Parganas Justice), as modified up to 1st October, 1899	0 4 0 [1a.]
Regulation I of 1895 (Kachin Hill Tribes), as modified up to 1st April, 1902	0 6 0 [1a.]

III.—ACTS AND REGULATIONS OF THE GOVERNOR-GENERAL OF INDIA IN COUNCIL AS ORIGINALLY PASSED.

Acts (unrepealed) of the Governor-General of India in Council from 1854 to 1908.

Regulations made under the Statute 33 Vict., Cap. 3, from No. II of 1875 to 1908. 8vo, Stitched.

[The above may be obtained separately. The price is noted on each.]

V.—TRANSLATION OF ACTS AND REGULATIONS OF THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

Acts X of 1841 and XI of 1850 (Registration of Ships), as modified up to 1st December, 1893, with foot-notes brought down to 1st December 1901	In Urdu ... 0 2 6 [1a.]
Act XX of 1847 (Copyright), as modified up to 1st May, 1896	In Urdu ... 0 1 3 [1a.] In Nagri ... 0 1 3 [1a.]
Act XVIII of 1850 (Judicial Officers' Protection) with foot-notes	In Urdu ... 0 0 6 [1a.] In Nagri ... 0 0 6 [1a.]
Act XXXIV of 1850 (State Prisoners), as modified up to 30th April, 1903	In Urdu ... 0 0 6 [1a.] In Nagri ... 0 0 6 [1a.]
Act XXX of 1852 (Naturalization), as modified up to 1st December, 1902	In Urdu ... 0 0 6 [1a.] In Nagri ... 0 0 6 [1a.]
Act XII of 1855 (Legal Representatives' Suits) as modified up to 1st November, 1904	In Urdu ... 0 0 3 [1a.] In Nagri ... 0 0 3 [1a.]
Act XII of 1855 (Fatal Accident), as modified up to 1st December, 1903	In Urdu ... 0 0 6 [1a.] In Nagri ... 0 0 6 [1a.]
Act XX of 1856, as modified up to 1st November, 1903	In Urdu ... 0 2 6 [1a.] In Nagri ... 0 2 6 [1a.]
Act XXXIV of 1858 [Lunacy (Supreme Courts)] as modified up to 30th April, 1903	In Urdu ... 0 1 0 [1a.] In Nagri ... 0 1 0 [1a.]
Act XXXV of 1858 [Lunacy (District Courts)], as modified up to 30th April, 1903	In Urdu ... 0 1 0 [1a.] In Nagri ... 0 1 0 [1a.]
Act XXXVI of 1858 (Lunatic Asylums), as modified up to 31st May, 1902	In Urdu ... 0 1 6 [1a.]
Act XIII of 1859 (Workman's Breach of Contract), as affected by Act XVI of 1874	In Urdu ... 0 0 3 [1a.] In Nagri ... 0 0 3 [1a.]
Act IX of 1860 (Employers and Workmen (Disputes)] as modified up to 1st December, 1904	In Urdu ... 0 0 3 [1a.] In Nagri ... 0 0 3 [1a.]

				Rs. A. P.		
Act XLV of 1860 (Penal Code), as modified up to	{ In Urdu	...	1	5	0	[5a.]
1st April, 1903	{ In Nagri	...	1	5	0	[5a.]
Act V of 1861 (Police), as modified up to 7th	{ In Urdu	...	0	2	0	[1a.]
March, 1903	{ In Nagri	...	0	2	0	[1a.]
Act XVI of 1861 (Stage-Carriages), as modified up to 1st February, 1898	{ In Urdu	...	0	1	3	[1a.]
	{ In Nagri	...	0	1	3	[1a.]
Act III of 1864 (Foreigners), as modified up to	{ In Urdu	...	0	1	0	[1a.]
1st September, 1906...	{ In Nagri	...	0	1	0	[1a.]
Act VI of 1864 (Whipping), as modified up to	{ In Urdu	...	0	1	6	[1a.]
1st April, 1900	{ In Nagri	...	0	1	6	[1a.]
Act III of 1865 (Carriers), as modified up to	{ In Urdu	...	0	0	9	[1a.]
31st May, 1903	{ In Nagri	...	0	0	9	[1a.]
Act III of 1867 (Gambling), as modified up to						
1st December, 1896	In Nagri	...	0	2	0	[1a.]
Act V of 1869 (Indian Articles of War), as modified up to 1st January, 1896	In English,		3	0	0	[5a.]
Urdu and Nagri	Unbound	...	2	8	0	[5a.]
Act VII of 1870 (Court-fees), as modified up to						
1st December, 1896	In Urdu	...	0	8	3	[2a. 6p.]
Ditto ditto as modified up to						
1st October, 1890	In Nagri	...	0	8	0	[1a.]
Act I of 1871 (Cattle-trespass) as modified up	{ In Urdu	...	0	1	0	[1a.]
to 1st December	{ In Nagri	...	0	1	0	[1a.]
Act XXIII of 1871 (Pensions),	{ In Urdu	...	0	0	0	[1a.]
	{ In Hindi	...	0	0	9	[1a.]
Act I of 1872 (Evidence), as modified up to 1st	{ In Urdu	...	0	8	0	[2a.]
May, 1908	{ In Nagri	...	0	8	0	[2a.]
Act IV of 1872 (Punjab Laws), as modified up to						
1st November, 1904	In Urdu	...	0	2	0	[1s. 0p.]
Act IX of 1872 (Contract), as modified up to	{ In Urdu	...	0	0	0	[3a.]
1st September, 1899	{ In Nagri	...	0	0	0	[3a.]
Act XV of 1872 (Christian Marriage), as modified up to 1st April, 1891	{ In Urdu	...	0	4	0	[2a.]
	{ In Nagri	...	0	4	0	[2a.]
Act V of 1873 (Government Savings Bank),	{ In Urdu	...	0	0	0	[1a.]
as modified up to 1st April, 1903	{ In Nagri	...	0	0	0	[1a.]
Act VIII of 1873 (Northern India Canal and	{ In Urdu	...	0	3	3	[1a.]
Drainage), as modified up to 15th July, 1890	{ In Nagri	...	0	3	3	[1a.]
Act X of 1873 (Oaths), as modified up to 1st Feb-	{ In Urdu	...	0	0	0	[1a.]
ruary, 1903	{ In Nagri	...	0	1	0	[1a.]
Act IX of 1875 (Majority), as modified up to 1st	{ In Urdu	...	0	0	3	[1a.]
May, 1906	{ In Nagri	...	0	0	3	[1a.]
Act of 1877 (Specific Relief), as modified up to	{ In Urdu	...	0	4	6	[1s. 6p.]
1st February, 1904	{ In Nagri	...	0	4	3	[1s. 6p.]
Act III of 1877 (Registration), as modified up	{ In Urdu	...	0	4	3	[2a.]
to 1st December, 1896	{ In Nagri	...	0	4	6	[2a.]
Act I of 1878 (Opium), as modified up to 1st De-						
cember, 1896	In Nagri	...	0	1	6	[1a.]
Act VII of 1878 (Forests), as modified up to 1st	{ In Urdu	...	0	4	0	[1a. 6p.]
December, 1903	{ In Nagri	...	0	3	9	[1a. 6p.]
Act XI of 1878 (Arms), as modified up to 1st May,	{ In Urdu	...	0	2	0	[1a.]
1904	{ In Nagri	...	0	2	0	[1a.]
Act XVI of 1878 (Northern India Ferries), as	{ In Urdu	...	0	2	0	[1a.]
modified up to 1st June, 1902	{ In Nagri	...	0	2	0	[1a.]

			R. A. P.		
Act XVIII of 1879 (Legal Practitioners), as modified up to 1st May 1898	... {In Urdu ... {In Nagri	... 0 2 6 {1a.] ... 0 2 0 {1a.]			
Act XV of 1881 (Factories), as modified up to 1st April 1891	... {In Urdu ... {In Nagri	... 0 1 6 {1a.] ... 0 1 6 {1a.]			
Act XVIII of 1881 (Central Provinces Land Revenue), as modified up to 1st November, 1898	... {In Urdu ... {In Nagri	... 0 9 0 {1a. 6p.] ... 0 9 0 {1a. 6p.]			
Act IV of 1882 (Transfer of Property), as modified up to 1st March, 1900	... {In Urdu ... {In Nagri	... 0 6 9 {2a.] ... 0 6 9 {2a.]			
Act VI of 1882 (Companies), as modified up to 1st August, 1906	... {In Urdu ... {In Nagri	... 0 13 9 {3a.] ... 0 14 0 {3a.]			
Act XIV of 1882 (Code of Civil Procedure), as modified up to 1st December, 1899	... In Urdu	... 1 4 0 {1a.]			
Act XIX of 1883 (Land Improvement Loans), as modified up to 1st September, 1906	... {In Urdu ... {In Nagri	... 0 1 0 {1a.] ... 0 1 0 {1a.]			
Act XXI of 1883 (Emigration), as modified up to 1st December, 1902	... {In Urdu ... {In Nagri	... 0 4 9 {1a. 6p.] ... 0 4 6 {1a. 6p.]			
Act IV of 1884 (Explosives), as modified up to 1st May, 1896	... {In Urdu ... {In Nagri	... 0 1 3 {1a.] ... 0 1 3 {1a.]			
Act VI of 1884 (Inland Steam-vessels), as modified up to 1st July, 1891	... {In Urdu ... {In Nagri	... 0 3 6 {1a. 6p.] ... 0 3 6 {1a. 6p.]			
Act XII of 1884 (Agriculturists Loans), as modified up to 1st September, 1906	... {In Urdu ... {In Nagri	... 0 0 6 {1a.] ... 0 0 6 {1a.]			
Act XVIII of 1884 (Punjab Courts), as modified up to 1st December 1899	... In Urdu	... 0 2 6 {1a.]			
Act II of 1885 (Negotiable Instruments Amendment),	... In Urdu	... 0 0 0 {1a.]			
Act III of 1885 (Transfer of Property Amendment)	... In Urdu	... 0 0 3 {1a.]			
Act X of 1885 (Oudh Estates Amendment),	... In Urdu	... 0 0 3 {1a.]			
Act XIII of 1885 (Telegraphs), as modified up to 1st March, 1905...	... In Urdu	... 0 1 0 {1a.]			
Act XXI of 1885 (Madras Civil Courts Amendment),	... In Urdu	... 0 0 3 {1a.]			
Act II of 1886 (Income tax), as modified up to 1st April, 1903	... {In Urdu ... {In Nagri	... 0 3 0 {1a. 6p.] ... 0 3 0 {1a. 6p.]			
Act IV of 1886 (Amending Section 255 of Contract Act),	... In Urdu	... 0 0 3 {1a.]			
Act VI of 1886 (Births, Deaths and Marriage Registration)	... In Urdu	... 0 1 3 {1a.]			
Act VII of 1886 (Registration Amendments)	... In Urdu	... 0 0 3 {1a.]			
Act X of 1886 (Criminal Law Amendment),	... In Urdu	... 0 0 0 {1a.]			
Act XI of 1886 (Tramway), as modified up to 31st December, 1900	... {In Urdu ... {In Nagri	... 0 3 3 {1a.] ... 0 3 3 {1a.]			
Act XIII of 1886 (Securities), as amended by the Repealing and Amending Act, 1891	... {In Urdu ... {In Nagri	... 0 0 9 {1a.] ... 0 0 9 {1a.]			
Act VI of 1887 (Companies Amendment),	... In Urdu	... 0 0 3 {1a.]			
Act VII of 1887 (Suits Valuation),	... In Urdu	... 0 0 9 {1a.]			
Act IX of 1887 (Provincial Small Cause Courts), as modified up to 1st December, 1896	... {In Urdu ... {In Nagri	... 0 2 3 {1a.] ... 0 2 6 {1a.]			
Act X of 1887 (Native Passenger Ships),	... In Urdu	... 0 1 6 {1a.]			

				Rs. A. P.		
Act XII of 1887 (Bengal, North-West Provinces and Assam Civil Courts) ...	In Urdu	...	...	0	1	3 [1n]
	In Nagri	...	...	0	1	3 [1n]
Act XIV of 1887 (Indian Marine), as modified up to 15th February, 1899 ...	In Urdu	...	...	0	3	0 [1n]
	In Nagri	...	...	0	3	0 [1a]
Act XV of 1887 (Burma Military Police), ...	In Urdu	...	...	0	0	0 [1n]
	In Nagri	...	...	0	0	0 [1n]
Act XVIII of 1887 (Allahabad University), ...	In Urdu	...	...	0	1	0 [1n]
Act III of 1888 (Police), as modified up to 1st March, 1893 ...	In Urdu	...	...	0	0	0 [1n]
Ditto (as passed) ...	In Nagri	...	...	0	0	0 [1n]
Act IV of 1888 (Indian Reserve Forces), as modified up to 1st March, 1893 ...	In Urdu	...	...	0	0	3 [1n]
Ditto (as passed) ...	In Nagri	...	...	0	0	3 [1n]
Act V of 1888 (Invention and Designs), ...	In Urdu	...	...	0	2	3 [1n]
Act VI of 1888 (Debtors), ...	In Urdu	...	...	0	0	0 [1a]
	In Nagri	...	...	0	0	0 [1a]
Act VII of 1888 (Civil Procedure Amendment) ...	In Urdu	...	...	0	1	0 [1a]
	In Nagri	...	...	0	1	0 [1n]
Act I of 1889 (Metal Tokens), as modified up to 1st April, 1901 ...	In Urdu	...	...	0	0	6 [1a]
	In Nagri	...	...	0	0	6 [1n]
Act II of 1889 (Measures of Length), ...	In Urdu	...	...	0	0	3 [1a]
	In Nagri	...	...	0	0	3 [1n]
Act VI of 1889 (Merchandise Marks), as modified up to 1st February, 1901 ...	In Urdu	...	...	0	1	0 [1n]
	In Nagri	...	...	0	2	0 [1a]
Act VI of 1889 (Probate and Administration), ...	In Urdu	...	...	0	0	0 [1n]
	In Nagri	...	...	0	0	0 [1n]
Act X of 1889 (Ports), as modified up to 1st June, 1891 ...	In Urdu	...	...	0	5	0 [2n]
	In Nagri	...	...	0	5	0 [2n]
Act XIII of 1889 (Cantonments), as modified up to 1st March, 1895 ...	In Nagri	...	...	0	3	0 [1n Op]
Act XV of 1889 (Official Secrets), as modified up to 1st April 1901 ...	In Urdu	...	...	0	0	0 [1a]
	In Nagri	...	...	0	0	0 [1a]
Act XVI of 1889 (Central Provinces Land Revenue), ...	In Urdu	...	...	0	1	6 [1a.]
	In Nagri	...	...	0	1	6 [1a.]
Act XX of 1889 (Lunatic Asylums Amendment), ...	In Urdu	...	...	0	3	0 [1a.]
Act I of 1890 (Revenue Recovery), ...	In Urdu	...	...	0	3	0 [1a.]
Act II of 1890 (Amending Acts XVII of 1861, X of 1865, II of 1874 and V of 1881), ...	In Urdu	...	...	0	3	0 [1a.]
Act V of 1890 (Indian Forest and Burma Forest Amendment), ...	In Urdu	...	...	0	0	6 [1a.]
Act VI of 1890 (Charitable Endowments), ...	In Urdu	...	...	0	0	6 [1a.]
Act VIII of 1890 (Guardians and Wards), ...	In Urdu	...	...	0	2	3 [1n 9p.]
Act IX of 1890 (Railways), as modified up to 1st June, 1905 ...	In Urdu	...	...	0	8	0 [2a.]
Act IX of 1890 (Railways), as modified up to 1st May, 1896 ...	In Nagri	...	...	0	8	0 [2a.]
Act X of 1890 (Press and Registration of Books Amendment), ...	In Urdu	...	...	0	0	3 [1a.]
Act XI of 1890 (Prevention of Cruelty to Animals), ...	In Urdu	...	...	0	3	[1a.]

				Rs. A. P.			
Act XVIII of 1890 (Emigration Amend- ment),	In Urdu	...	0 0 3	[1a.]			
Act XIX of 1890 (Salt-Amendment), ...	In Urdu	...	0 0 3	[1a.]			
Act XX of 1890 (North-Western Provinces and Oudh),	In Urdu	...	0 1 0	[1a.]			
Act V of 1891 (Ports Act Amendment), ...	In Urdu	...	0 0 3	[1a.]			
Act X of 1891 (Indian Criminal Law Amend- ment),	In Urdu	...	0 0 3	[1a.]			
Act XIV of 1891 (Oudh Courts),	In Urdu	...	0 0 6	[1a.]			
Act XVIII of 1891 (Bankers' Books Evi- dence), as modified by Acts I of 1893 and XII of 1900	In Urdu In Nagri	...	0 0 3 0 0 6	[1a.] [1a.]			
Act II of 1892 (Christian Marriage Valid- ation),	In Urdu	...	0 0 3	[1a.]			
Act IV of 1892 (Bengal Court of Wards Am- endment),	In Urdu	...	0 0 6	[1a.]			
Act VI of 1892 (Limitation Act and Civil Pro- cedure Code Amendment),	In Urdu	...	0 0 3	[1a.]			
Act IV of 1893 (Partition),	In Urdu	...	0 0 3	[1a.]			
Act I of 1894 (Land Acquisition),	In Urdu In Nagri	...	0 2 3 0 1 6	[1a Cp] [1a Cp]			
Act III of 1894 (Criminal Procedure and Penal Codes Amendment),	In Urdu	...	0 0 3	[1a.]			
Act V of 1894 (Civil Procedure Code Amend- ment),	In Urdu In Urdu	...	0 0 3 0 0 3	[1a] [1a]			
Act VIII of 1894 (Trust), as modified up to 1st October, 1903	In Urdu In Nagri	...	0 4 0 0 3 0	[1a] [2a]			
Act IX of 1894 (Prisons),	In Urdu In Nagri	...	0 1 3 0 2 3	[1a] [1a]			
Act VII of 1895 (Civil Procedure Code and Laws Act Amendment),	In Urdu In Nagri	...	0 0 3 0 0 3	[1a] [1a]			
Act XII of 1895 (Companies—Memorandum of Association),	In Urdu	...	0 3 0	[1a.]			
Act XIV of 1895 (Pilgrim Ships)	In Urdu	...	0 1 3	[1a.]			
Act II of 1896 (Cotton-duties),	In Urdu In Nagri	...	0 1 3 0 1 0	[1a.] [1a.]			
Act VI of 1896 (Indian Penal Code Amend- ment),	In Urdu	...	0 0 3	[1a.]			
Act VIII of 1896 (Inland Bonded Ware- houses),	In Urdu In Nagri	...	0 0 3 0 0 3	[1a] [1a]			
Act XII of 1896 (Excise), as modified up to 1st August, 1905	In Nagri	...	0 3 3	[1a]			
Act I of 1897 (Act XXXVII of 1850 Amend- ment),	In Urdu In Nagri	...	0 0 3 0 0 3	[1a] [1a]			
Act II of 1897 (Criminal Tribes Act Amend- ment),	In Urdu	...	0 0 3	[1a]			
Act III of 1897 (Epidemic Diseases)	In Urdu In Nagri	...	0 0 3 0 0 3	[1a.] [1a.]			
Act IV of 1897 (Fisheries)	In Urdu In Nagri	...	0 0 3 0 0 3	[1a.] [1a.]			
Act IV of 1897 (Negotiable Instruments Act Amendment)	In Urdu In Nagri	...	0 0 3 0 0 3	[1a.] [1a.]			

			Rs.	A.	P.	
Act VII of 1897 (Indian Emigration Act (In Urdu	0	0	3	[1a.]
Amendment) In Nagri	0	0	9	[1a.]
Act VIII of 1897 (Reformatory Schools) ...	(In Urdu	...	0	0	3	[1a.]
	(In Nagri	...	0	0	9	[1a.]
Act IX of 1897 (Provident Fund), as modified	(In Urdu	...	0	0	9	[1a.]
up to 1st April, 1903 ...	(In Nagri	...	0	0	9	[1a.]
Act X of 1897 (General Clauses) ...	(In Urdu	...	0	1	0	[1a.]
	(In Nagri	...	0	1	0	[1a.]
Act XII of 1897 (Local Authorities Emer-	(In Urdu	...	0	0	3	[1a.]
gency Loans) ...	(In Nagri	...	0	0	3	[1a.]
Act XV of 1897 (Cantonments) ...	(In Urdu	...	0	0	3	[1a.]
Act I of 1898 [Stage Carriages Act [1861]	(In Urdu	...	0	0	3	[1a.]
Amendment] ...	(In Nagri	...	0	0	3	[1a.]
et III of 1898 (Lepers) ...	(In Urdu	...	0	0	6	[1a.]
	(In Nagri	...	0	0	6	[1a.]
Act IV of 1898 Indian Penal Code Amend- n Urdu	0	0	3	[1a.]
ment)	1	4	0	[8a.]
Act V of 1898 (Code of Criminal Proce-	(In Urdu	...	1	6	0	[8a.]
dure), as modified up to 1st April 1900. ..	(In Nagri	...	0	2	0	[1a.]
Act VI of 1898 (Post Office). ...	(In Urdu	...	0	2	0	[1a.]
	(In Nagri	...	0	0	3	[1a.]
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	(In Nagri	...	0	0	3	[1a.]
Act X of 1899 (Indian Insolvency Rules) ...	(In Urdu	...	0	0	3	[1a.]
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	(In Nagri	...	0	0	0	[1a.]
Act XI of 1899 (Court-fees Amendment) ..	(In Urdu	...	0	0	0	[1a.]
	(In Nagri	...	0	0	6	[1a.]
Act XII of 1899 (Currency Notes Forgery)	(In Urdu	...	0	0	3	[1a.]
	(In Nagri	...	0	0	3	[1a.]
Act XVI of 1899 (Traffic Amendment) ..	(In Urdu	...	0	0	3	[1a.]
	(In Nagri	...	0	0	3	[1a.]
Act XVII of 1899 (Indian Registration	(In Urdu	...	0	0	3	[1a.]
Amendment). ...	(In Nagri	...	0	0	3	[1a.]
Act XVIII of 1899 (Land Improvement	(In Urdu	...	0	0	3	[1a.]
(Loans Amendment) ...	(In Nagri	...	0	0	3	[1a.]
Act XX of 1899 (Presidency Banks). ...	(In Urdu	...	0	0	3	[1a.]
	(In Nagri	...	0	0	3	[1a.]
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cy Amendment) ..	(In Nagri	...	0	0	3	[1a.]

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Act I of 1900 (Indian Articles of War Amendment) ...	{ In Urdu	0	1	3	[1a.]
Act IV of 1900 (Indian Companies (Branch Register)) ...	{ In Urdu	0	0	3	[1a.]
Act IX of 1900 (Amendment of Court Fees Act 1870) ...	{ In Urdu	0	0	3	[1a.]
Act X of 1900 (Census) ...	{ In Urdu	0	0	0	[1a.]
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High Court, as a Court of Revision, to quash a commitment made to it in its Original Criminal Jurisdiction—Criminal Procedure Code (Act V of 1898), ss. 208, 215 and 347. Section 347 of the Criminal Procedure Code cannot be read as subject to s. 208, so as to render it imperative on a Magistrate, after he has decided to commit the case to the Sessions, to allow the accused to cross-examine the prosecution witnesses and to call witnesses in his defence. Where, therefore, the accused did not cross-examine the prosecution witnesses immediately after their examination-in-chief, but applied to the Magistrate, after the close of the prosecution, to cross-examine them and to examine defence witnesses:—Held, that the Magistrate was justified under s. 347 in committing the case

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HINDU LAW—Will, construction of—Direction as to management of property—Gifts—Express gift, or *in words of gift*—Partition—Widow's right to share on partition. An express gift by will of property by a testator to his sons will defeat the right of a widow to a share on partition. *Debendra Coomar Roy Chowdhry v. Brojendra Coomar Roy Chowdhry*, I. L. R. 17 Calc. 886, referred to. Where however a will contains no words of gift to the sons, but merely operates to postpone a partition of the property to a particular date with directions as to management in the meantime, the property vests in the widow as executrix for that purpose, and the sons take the property as on an intestacy and not by any bequest. *Kishori Mohun Ghose v. Moni Mohun Ghose*, I. L. R. 12 Calc. 165, *Sorolah Dossee v. Bhobun Mohun Neoghy*, I. L. R. 15 Calc. 292, referred to. Where a widow is entitled to a share on partition, her right is not affected by the fact that she had already inherited a share from one of her sons. *Jugomohan Haldar v. Sarodamoyee Dossee*, I. L. R. 3 Calc. 149, referred to. The share, which a widow takes as heiress of her son, is not *stridhan* property. *Jodoonath Dey Sircar v. Brojonath Dey Sircar*, 12 B. L. R. 385, referred to.

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JURISDICTION—Landlord and tenant—Suit for land—Suit by lessee for rents and profits during absence—Lessor in possession—Letters Patent, 1865, cl. 12. A, a lessee of certain premises outside the jurisdiction of the Court, having vacated the premises on account of being sentenced to a term of imprisonment, on his release brought a suit against the lessor, who had in the meantime taken over possession, claiming the rents and profits arising therefrom pending the termination of the lease, and further claiming that the lessor during his absence became trustee for him. At the hearing the lessor contended there was no cause of action as this was a suit for land. *Held*, that, inasmuch as the lessor was seeking to obtain possession of the premises by claiming the rents and profits from the lessor, he sought to do something, *in pais*, affecting the property, and therefore this was a good

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RECEIVER— <i>Lease—Summary jurisdiction—Remedy—Interest—Receiver's accounts—Practice.</i> Where a lease had been already granted by a Receiver acting under an order of Court, and possession of the property had been given to the lessee, and subsequently certain parties applied to the Court for a declaration that the lease was invalid, and for certain other reliefs against the Receiver and the lessee. <i>Held</i> , that no summary order could be passed to set aside the lease. The proper remedy would be by suit against	
alleged that the	
<i>Roy v. Doorga</i>	
<i>Held further,</i>	
de against the	
lessee for interest on arrears of rent, nor could any order be passed against the Receiver in respect of the same, as this was a matter touching the Receiver's accounts.	
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HAIDER KHAN v. SECRETARY OF STATE FOR INDIA IN COUNCIL (1908)
I. L. R. 36 Cal. 1

REGULATION III of 1891—Jhum cultivation in Sylhet—Regulation extinguishing proprietary rights and giving compensation—Onus of proof as to applicability of Regulation—Question of fact, concurrent decisions of Courts in India on—Proof of reason for taking profits of jhum lands into account in estimating income of settled estate—Long possession and enjoyment as proof of title. Regulation III of 1891 (issued under Statute 33 Vict. C. 3) recited in the preamble that "the officers, who effected the permanent settlement of certain estates in Sylhet, included for the purposes of assessment, among the assets of those estates under the designation of *ghum*, the income then derived by the proprietors of those estates from shifting cultivation carried on by them or their dependants beyond the limits of those estates; that the cultivation shifted from year to year over immense and altogether undefined areas, and the tracts of land, over which they extended, were not specified at the time of the settlement and in consequence of this rights of various, and in some cases vague, descriptions are from time to time asserted by the said proprietors over such areas, that it is thus impossible for any person to obtain a safe and clear title to land in those areas, and the extension of cultivation is in consequence impeded, and that it is expedient that the rights, if any, corresponding to the said *ghum* assets should be commuted." Section 2 enacted that all such rights should be deemed to have been extinguished; and by s. 3 it was declared that all proprietors of such estates should be entitled to compensation. The Government extended the above Regulation to certain areas under *ghum* cultivation belonging to the appellants, who and their predecessors in title had held them since 1837. In a suit brought against the Secretary of State for India in Council by the appellants, they

that as the Government were claiming to apply to lands, which had undoubtedly been long in the enjoyment of the predecessors in title of the appellants, a Regulation, which would have the effect of confiscating proprietary rights and giving compensation in exchange, it lay upon the Government to show that the facts of the case were such as to bring it within the operation of the Regulation. *Held*, also that the question whether the *ghum* lands lay within or without the limits of the settled estates was not a question of fact, on which the concurrent decisions of the Courts in India could be accepted as final. In a sense it was one of fact, but at every point in the process of reasoning considerations of law had to be regarded. It was not disputed that the taluks held by the appellants had been settled with their predecessors in title at the permanent settlement, and that the profits of the *ghum* lands in dispute had then been brought into account in estimating the assets of the taluks, but the parties differed as to the reason why they had been so taken into account. *Held*, that on the documentary evidence in the case there was, after such a lapse of time, not sufficient to show whether they had been so taken into account, because the *ghum* lands formed part of the settled estate as contended for by the appellants, or because they had been treated as assets accruing to the owners of the settled estate, but derived from land lying outside it as the Government contended. No confident conclusion, therefore, could be drawn from the evidence as to whether the disputed land was part of the

settled estate, or was beyond its limits. *Held*, however, that the possession and enjoyment of the disputed land by the appellants and their predecessors in title taken together with the instances in evidence in 1842, 1843, and 1855, in which it had been confirmed by the Government, was sufficient to prove their title. Since the last named date such possession and enjoyment had been continuous.

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REMEDY: <i>See</i> RECEIVER	52

REVISION—*High Court, revisional jurisdiction over immoveable property*
 —Power to interfere with orders directing restoration of possession of immoveable property—Duty of Magistrate to pass orders under ss. 517 and 522 in favour of a party forcibly dispossessed—Criminal Procedure Code (Act V of 1898), ss. 423 (1) (d), 439, 517, and 522. Under section 423 (1) (d) of the Criminal Procedure Code the High Court has power to interfere with an order of a Magistrate.

convicted under section 323 of the Penal Code. *Held*, that it was not necessary for the Magistrate to have passed orders under sections 517 and 522 of the Criminal Procedure Code in favour of the accused.

ARMED ALI v. KEENOO KHAN (1908) I. L. R. 36 Calc.	44
SETTLED ESTATES: <i>See</i> JHM CULTIVATION	1
SUIT FOR LAND: <i>See</i> JURISDICTION	59
SUIT: <i>See</i> TRESPASS	28
SUMMARY JURISDICTION: <i>See</i> RECEIVER	52

—*Power to determine jurisdiction to try*
 —*Section 260—*
 —*al Muncipal*
 —*complaint*
 —*to try*
 —*examined*
 —*from*

ables of the defaulters, wherever found within the Municipality, or any other moveables found within the holding specified, it was held that the tax daroga was justified in attaching goods proved to belong to the defaulters, which were found within the municipal limits.

FANINDRA NATH CHATTERJEE v. EMPEROR* (1908) I. L. R. 36 Calc.	67
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TRESPASS—Court of Wards, powers of—Mal-administration—Court of Wards Act (Bengal Act IX of 1879)—"Proprietor"—Infant beneficiary, residuary legatee, when "proprietor"—Executrix, position of—Possession—Continuing trespass—Injunction—Civil Procedure Code (Act XIV of 1852) s. 421—Notice of suit, whether necessary,

where Public Officers are sued in individual capacity, or injunction sought—Jurisdiction—Immoveable property—Acquisition by executrix—Trespass under order of higher official. Thirteen years having elapsed since the death of the testator, and the administration by the executrix of his estate, which consisted of immoveable property in Eastern Bengal and Assam, not being complete, and there being a suggestion of mal-administration, the Court of Wards of

tion the executrix purchased a house in Calcutta for the estate and out of the assets of the estate. The officers appointed by the Court of Wards proceeded to execute its directions, they collected and appropriated rents, the collection, however, being made in the name of the executrix as mutation of names had not been effected, and they took over the establishment of the executrix in the absence of the executrix, without her consent and in spite of

was entitled to relief by way of injunction. Section 424 of the

party for the estate by the executrix, by purchase out of the assets of the estate formed part thereof, although the purchase took place after the declaration of the Court of Wards taking over charge of the estate. A trespass committed by order of a higher official is in substance the act of that official, who can be sued as a trespasser.

THE
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Calcutta Series.

PRIVY COUNCIL.

HAIDAR KHAN

v.

SECRETARY OF STATE FOR INDIA IN COUNCIL.

[On appeal from the High Court at Fort William in Bengal.]

Regulation III of 1891—Jhum cultivation in Sylhet—Regulation extinguishing proprietary rights and giving compensation—Onus of proof as to applicability of Regulation—Question of fact, concurrent decisions of Courts in India on—Proof of reason for taking profits of jhum lands into account in estimating income of settled estates—Long possession and enjoyment as proof of title.

Regulation III of 1891 (issued under Statute 33 Vict. C. 3) recited in the preamble that "the officers, who effected the permanent settlement of certain estates in Sylhet, included for the purposes of assessment, among the assets of those estates under the designation of *jhum*, the income then derived by the proprietors of those estates from shifting cultivation carried on by them or their dependants beyond the limits of those estates; that the cultivation shifted from year to year over immense and altogether undefined areas, and the tracts of land, over which they extended, were not specified at the time of the settlement and in consequence of this rights of various, and in some cases vague, descriptions are from time to time asserted by the said proprietors over such areas; that it is thus impossible for any person to obtain a safe and clear title to land in those areas, and the extension of cultivation is in consequence impeded, and that it is expedient that the rights, if any, corresponding to the said *jhum* assets should be commuted."

**Present* :—Lord Robertson, Lord Atkinson, Lord Collins, Sir Andrew Scoble, and Sir Arthur Wilson.

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Section 2 enacted that all such rights should be deemed to have been extinguished ; and by s. 3 it was declared that all proprietors of such estates should be entitled to compensation.

The Government extended the above Regulation to certain areas under *jhum* cultivation belonging to the appellants, who and their predecessors in title had held them since 1837. In a suit brought against the Secretary of State for India in Council by the appellants they alleged that the land in dispute appertained to taluks, which had been settled with their predecessors in title at the time of the permanent settlement, and prayed for a declaration that it did not come within the operation of Regulation III of 1891.

Held, that as the Government were claiming to apply to lands, which had undoubtedly been long in the enjoyment of the predecessors in title of the appellants, a Regulation, which would have the effect of confiscating proprietary rights and giving compensation in exchange, it lay upon the Government to show that the facts of the case were such as to bring it within the operation of the Regulation.

Held, also, that the question whether the *jhum* lands lay within or without the limits of the settled estates was not a question of fact, on which the concurrent decisions of the Courts in India could be accepted as final. In a sense it was one of fact, but at every point in the process of reasoning considerations of law had to be regarded.

It was not disputed that the taluks held by the appellants had been settled with their predecessors in title at the permanent settlement, and that the profits of the *jhum* lands in dispute had then been brought into account in estimating the assets of the taluka, but the parties differed as to the reason why they had been so taken into account.

Held, that on the documentary evidence in the case there was, after such a lapse of time, not sufficient to show whether they had been so taken into account, because the *jhum* lands formed part of the settled estate as contended for by the appellants, or because they had been treated as assets accruing to the owners of the settled estate, but derived from land lying outside it as the Government contended. No confident conclusion, therefore, could be drawn from the evidence as to whether the disputed land was part of the settled estate, or was beyond its limits.

Held, however, that the possession and enjoyment of the disputed land by the appellants and their predecessors in title taken together with the instances in evidence in 1842, 1843, and 1855, in which it had been confirmed by the Government, was sufficient to prove their title. Since the last named date such possession and enjoyment had been continuous.

APPEAL from a judgment and decree (29th March 1904) of the High Court at Calcutta, which affirmed a judgment and decree (15th April 1899) of the Subordinate Judge of Sylhet.

The representatives of the plaintiff were the appellants to His Majesty in Council.

The suits, out of which these appeals arose, related to a hill tract of forest land (called *jhum*) situated in Pergunnah Langla in the Sylhet district, known as *mouza* Puber Pahar, which the plaintiff contended was included in the villages permanently settled with him, and of a certain portion of which he was the sole owner, and of the rest part owner.

He claimed a twofold title to the disputed lands : firstly, a title derived from the permanent settlement, and secondly, a title by adverse possession for 60 years. His cause of action was stated to be that the Chief Commissioner of Assam under the authority vested in him by the Sylhet *Jhum* Regulation III of 1891 had by notification of 23th July 1891 directed that the Regulation should be extended and applied to the disputed tract of land ; that subsequently the Deputy Commissioner of Sylhet served a notice on the plaintiff to the like effect, and the Government Forest Officers by notice enjoined the public not to enter the land and cut and remove straw, bamboo and other forest produce therefrom, by which action of the Government the vested rights of the plaintiff and his co-sharers had been adversely affected.

The suit was brought on 13th April 1897 against the Secretary of State for India in Council and the plaintiff's co-sharers in a portion of the land for the establishment of his title ; and the plaintiff prayed for a declaration that the land in dispute did not come within the operation of Regulation III of 1891, and that the notification of the Chief Commissioner was inoperative.

The first defendant denied the plaintiff's title and possession ; did not admit that the disputed land appertained to the permanently settled land of the plaintiffs ; and alleged that the lands in dispute were outside the limits of the permanently settled taluks, and contended that they therefore came within the operation of Regulation III of 1891. He further contended that the right of *jhum* was not a right of property in land, but was an easement and that, if the plaintiff and other *mirasidars* had a *jhum* right over the land in dispute, that right had been extinguished by the Regulation.

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The only issues now material were (5th) whether the land in dispute appertained to the plaintiff's permanently settled land ? (6th) whether the land in dispute lies not within the limits of the permanently settled estates, and therefore comes within the *Jhum* Regulation ? and (7th) whether the plaintiff has acquired any title to the disputed land by adverse possession ; and whether the plaintiff is in possession of the same or not ; and whether he has the share he alleges in the portion, of which he is not sole owner, or not ?

The principal documentary evidence was that of the *mouza-wari* papers for 1208 B.S. (1801-1802 A.D.), which showed that the income derived from *mouzah* Paber Puhar was included in the collection of the villages permanently settled ; and of the *mouza-wari* papers for 1209 B.S. (1802-1803 A.D.) and 1236 B.S. (1829-1830 A.D.), which contained the following remarks :—

" This quantity is estimated by sight only, but it may be less or more on enquiry being made in the Pergunnah. The *dastur* of *Jhum* cultivation is this : *Jhum* is not cultivated in one place every year. When land is found anywhere within these boundaries *Jhum* cultivation is made thereon, and after measurement and assessment the *Mirasidars* take the rest by apportionment according to their respective shares in the *Jhum* revenue at the time of the *hasbud* measurement. This hill is *Jhummai*."

These statements referred to *mouzah* Paber Puhar, and purported to be a statement " of *maha's* in Chukla Sylhet, except the abadi and jungle lands of *taluks*, belonging to *mirasidars* according to the *hasbud* prepared by Mr. John Willis." He was the Collector, who made the settlement, and from the above statements it appears that the land in dispute was included in the plaintiff's estate as *mirasidar* and was assessed to revenue as part of the estate.

From other documents it appeared that the plaintiff's title had on several occasions been affirmed. About 1840 the Government granted a lease of certain lands, not settled at the time of the permanent settlement, to Gun Singh Hazari and Gobind Singh Hazari. The lands leased were in the

neighbouring pergunnah Patharia. Under cover of the lease an attempt was made to realize rents from tenants cultivating in Puber Pahar. Gheur Ali Khan, the predecessor in title of the plaintiff, made objections, which were on 14th December 1842 decided in his favour by the Munsif of Huigajia, who held that "it was satisfactorily proved that the *jhum* lands on account of the disputed rents as stated by the plaintiffs, belong to the *jhummai taluks* possessed by the *mirasidars* of Langla Pergunnah." That finding was on appeal affirmed by the District Judge of Sylhet by judgment dated 20th May 1843.

After investigation, another order was made on 19th September 1848 excluding *mouzah* Puber Pahar, as being land permanently settled, from the area of land claimed by Government as land in regard to which a settlement had still to be made.

Later on further measurements were made of the Government lands, and in the maps prepared a large area of Puber Pahar was included. On objection taken the Revenue Commissioners of Dacca ordered the exclusion from the map of the area claimed as part of the estate of the plaintiff.

On 14th September 1855 the Board of Revenue again affirmed the plaintiff's title, and directed a refund of all monies wrongly collected by the Government in respect of the plaintiffs' land.

In 1860 some portion of Puber Pahar was again included in maps prepared of Government lands, and was on objection released by order of 28th February 1861.

The Subordinate Judge on the 5th issue held that the disputed land did not appertain to the permanently settled lands of the plaintiff.

On the 6th issue he said—

"From the preamble of the Regulation, it is evident that the Regulation does not apply to lands within the limits of the permanently settled estates, but applies to lands beyond the limits of those estates, upon which lands the proprietors of those estates carried on *Jhum* or shifting cultivation, the income derived from such cultivation having formed part of the estimated assets, which formed the basis for assessment of revenue of the permanently settled estates. The first question for determination, therefore, is whether

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the land in dispute is within, or is beyond, the limits of the permanently settled estates.

"The best evidence on the point was the *hasbud* measurement papers prepared by Mr. Willis, the then Collector of Sylhet, on the basis of which the decennial settlements were made. These papers clearly defined the boundaries of the estates permanently settled. If the land in dispute had been included by that measurement in the land of the permanently settled estates, the *hasbud* papers would have shown the fact. But the plaintiff has produced no such papers in support of his case. It must be observed that the defendant denied that the land in dispute was included in that measurement. It was not possible for him to prove the negative. The plaintiff, who asserted the affirmative, should have proved it. It might be said that the Government, being the custodian of the papers, should have produced all the *hasbud* papers to show that they did not include the disputed land. It must be remarked here that the papers were not in the shape of a bound volume, but consisted of separate small bundles, the papers relating to one *mouzah* forming a separate part. Such being the case, even if all the available papers had been produced, it might still be said that the papers relating to the disputed land had been withheld. There is no hint even that any *hasbud* paper relating to the disputed land ever existed. Under these circumstances, it is but fair to presume that the disputed land was not included in the *hasbud* measurement.

"The *mouzawari* statement (Ex. A) is an abridged compilation from the *hasbud* papers. Though it gives no boundaries it gives the names of all the villages contained in each of the estates permanently settled. In the plaint the plaintiff states that the disputed land is of *mouzah* (village) Puber Pahar (eastern hill). The *mouzawari* statement shows that no such village as Puber Pahar was among the villages contained by the several taluks claimed by the plaintiff. This statement shows that certain incomes were placed against मूंग ज़ूम (Mung Jhum); from this it is contended that the words Mung Jhum meant *mahal* Jhum or *mouzah* Jhum. I think this contention is not tenable. If *Jhum* had been a *mouzah*, it would have been preceded by the letter ञ (now) as in the case of other *mouzahe*, and would have come together with the other *mouzahe*, and not have been shown underneath on the paper. It appears that after stating the assets or incomes derived from the *mouzahe*, or villages contained in the *taluk*, the income of *Mung Jhum* is shown underneath the sum total. From this it is quite evident that *Mung Jhum* is not *mouzah* Jhum, but is the abbreviation of *mahal* Jhum. The full expression *mahal* Jhum is to be found in several places. The word *mahal* is here used not in the sense of an estate; for the statement from its very nature was the description of an estate, the number and name of which are given in columns 1 and 2 respectively; and certainly the assets of any other estate could not be included in the assets of that estate. From these considerations, I am clearly of opinion that the word मूंग or Mung is used in the sense of source of income. For the use of the word in that sense, vide Field's Introduction to Regulations, Ed. XXV (1875), page 41. On reading the *mouzawari* statement mentioned above, I clearly think that the statement after showing the assets of the

*mouza*s contained in the *taluk*, showed the assets or income derived from *ghum* cultivation, the statement being silent as to the area in respect of which such income was derived and such area necessarily remaining undefined. This was exactly the thing contemplated in the preamble of the Regulation. This statement does not at all show that the disputed land is within the limits of the permanently settled estates. So far as it goes it shows that this land is beyond the limits of those estates."

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From the measurements made in 1209 B.S. (1802-1803 A.D.) and 1236 B.S. (1829-1830 A.D.) and from the other documentary evidence mentioned above the Suhordinate Judge held it to be shown that the land in suit was not within the limits of the permanently settled lands of the plaintiff. On the 7th issue he held that the later possession of the plaintiff and his predecessors was sufficiently proved: but that the evidence was not sufficient to show their absolute possession for 60 years. He was of opinion that the nature of the acts of possession indicated a casual interest and not an absolute interest in the land, which could by prescription mature into ownership. No title therefore had been proved by adverse possession.

On these findings the Suhordinate Judge dismissed the suit.

On appeal (in which the present appellants (Mahomed Ali Haidar Khan and Mahomed Ali Asgar Khan) were put on the record in place of the original plaintiff (Mahomed Ali Amjad Khan), the High Court (SIR H. T. PRINSEP and HARRINGTON, J. J.) affirmed the Subordinate Judge's decision.

The material portion of their judgment was as follows:—

Plaintiff's case is that, inasmuch as the lands in suit formed portion of the lands permanently settled and made into the estates mentioned in schedules IV and V, their assets as *ghum* lands being taken into account in determining the revenue payable, they are not within the Regulation, which deals with lands beyond the limits of permanently settled estates.

Ghum lands are lands in wild and jungly tracts in the Sylhet Frontier, which were never brought under settlement by the Revenue authorities, but were left waste to be occupied by migratory cultivators, who after a time abandoned them and moved on to other similar lands with greater advantages. The proprietors of neighbouring estates seem to have taken rents or forest dues from these persons. Any rights so acquired either by the cultivators or by those who took rents or dues from them, were of a very indefinite and transitory character, and in the present case it is not shown that they were exercised

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in such a manner as to give the plaintiff, as claimed in the alternative, a title to the lands in suit by reason of possession for a period exceeding twelve years.

After reading the preamble and sections 2 and 3 of the Regulation III of 1891, the judgment proceeded—

The main questions for consideration, therefore, are whether by the proceedings in the permanent settlement of the estates mentioned in schedules IV and V, the lands in suit were included so as to form portions of those estates or whether beyond the limits of those estates the assets merely were taken into account for purposes of assessment of Government Revenue, but not so as to confer any title to the lands; in other words, whether the lands as such came within the terms of the Regulation.

In making a settlement of an estate it is the duty of a Revenue Officer to ascertain the assets realized by the proprietor in the shape of rents, &c., from the lands forming portion of that estate and to assess the Government revenue on the results. It appears from the evidence before us corroborated by the terms of the preamble of the Regulation, that when the permanent settlement of this part of the country was made, the income then derived from various rights was considered as an asset of the estate and taken into account in assessing the Government revenue. But it is equally clear that the rents paid for the occupation of land cultivated as *jhum* as well as such dues as were derived from cutting timber or otherwise, which may roughly be described as forest rights were variable and it could not be said that any particular proprietor received such rents or dues on account of any particular tract of country for any considerable and continuous period of time. Even at the present time, the evidence fails to show this. The lands were waste and unoccupied and had not been made liable to the payment of Government revenue and under the custom of the country they were left open to the sparse uncivilized tribes, who lived on the frontier, to use them as they thought proper. Admittedly these people were never regularly settled on any particular lands. They cleared jungles and used the timber and the cultivated lands as they thought proper, until they found that their labour could be more profitably directed to other lands and they then abandoned their former holdings and occupied these new lands. Meanwhile the proprietors of lands under settlement with Government took advantage of their superior position and influence and took rents and the dues realized by these persons from those occupying lands under the *jhum* custom were taken into account in assessing the Government revenue and the Government abstained from attempting to make any regular settlement in regard to the payment of revenue on account of *jhum* lands. There is nothing to show an admission by Government of any title to the large tract of waste lands still unoccupied save by casual acts of cultivation, cutting timber and so forth. How far the inclusion of such assets would give any title to the lands, for which rents were then paid, is another question. But if the lands were beyond the limits of the estates under permanent settlement, it is clear that they come within the Regulation, for it is to such lands that the Regulation is

expressly directed. This is shown by the preamble. All rights over such lands were declared to be extinguished, compensation being given for their loss and it was further declared that no claim on the ground of such rights shall be entertained in any such proceeding.

On the first issue tried, the Subordinate Judge found that the lands in dispute were not included within the boundaries of the permanently settled estates, because the plaintiff had failed to show that they were within the *hast-bud* papers, that is, the statement of the assets of the property, on which the settlement was made. The Subordinate Judge placed the burden of proof on the plaintiff to show that the lands in suit were so included, because the defendant Government denied this and he seems to doubt whether such papers ever existed. We must, however, take it that the settlement must have been made on some such basis. The case set up by the plaintiff is that, inasmuch as the assets derived by the proprietors of the *taluka* under settlement from *ghum* lands were taken into account with the assets of the *taluka* in determining the amount of revenue payable, these *ghum* lands became a portion of the estate and were consequently within its limits and thus beyond the operation of the Regulation. That view of the present suit will be presently considered.

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occupation of *jhum* lands, we cannot regard the action of the Revenue Officers in taking the assets derived from the *jhum* lands into account as being more than an assertion by them that they were receivable by the *talukdars* subject to the right of the paramount power of the Government, and were an item in the account on which the assessment of Government revenue should be determined. We cannot regard these as an admission of the right of the *talukdars* to the *jhum* lands as forming portion of the *taluk* under settlement or to be more than that the amount so received by them represented fairly what they might receive in exercise of the right to take rents and dues from those occupying or using temporarily *jhum* lands.

We have been next referred to a judgment of the Munsif in 1812 in a suit to recover damages for illegal distraint brought by certain cultivators of *jhum* lands against the *zamindars*, in which the lands were found to be within the *jhummai taluka* of *pergunnah* Langla possessed by the *mirasidars*. Great stress is laid on the use of the term *jhummai* and it is contended that from this we should hold that the lands had been assessed with Government revenue as portions of the estates permanently settled. (This judgment is no evidence against Government, who was no party to it.) But this does not necessarily follow. The term *jhummai* is used after describing the rights in *jhum* lands and it may be equally used to mean lands paying rents to the neighbouring *zamindars* under the *jhum* custom in force. So again, as found in the *rubolari* of the Collector of February 20th, 1861, on objection taken to the assessment with Government revenue of certain lands as *jhum* lands, they are described as *jhum jhummai* lands appertaining to the decennially settled *taluka* of *pergunnah* Langla, but that again does not necessarily show that they formed portions of those permanently settled *taluka*. That is to say, that those lands fell within the boundaries of those *taluka*. They are described as appertaining to them in the sense that their assets as *jhum* lands had been taken into account in the settlement of the revenue payable. In this sense they are not necessarily excluded from the terms of the Regulation. That would depend upon whether the *jhum* lands are within the limits of the settled estates.

We have been next referred to a considerable number of *kabuliats* executed by occupiers of *jhum* lands, some for payment of rent and others for payment of dues on account of what may be termed forest rights, in which the lands have been described as *jhum jhummai* lands of decennially settled *taluka*, and our attention has been directed to some of these *kabuliats*, which further described the lands as in *mouzah* Puber Pahar. But these again do not prove that the lands fell within the boundaries of the permanently settled estates. They merely show that the *zamindars* have acted in a manner such as is described by the Regulation in respect to persons occupying lands on the *jhum* system and not that any of the lands so dealt with are within permanently settled estates. Any statement to that effect that may be found in some of these *kabuliats* is no evidence of that.

" There is some other evidence in *mouzaari* papers purporting to show the details of the assessments of Government revenue on these estates by describing the *mouzas*, &c., and it is contended that these show that *jhum* lands were included not only in the assessment of the revenue but formed portions of the estates under settlement. But, in considering this evidence, it must be borne in mind that it cannot be denied that, when the settlements were made, the assets of *jhum* lands outside the estates were taken into account, not necessarily because the lands were included in the estates, but because the proprietors of the estates under the prevailing custom used to take rent, &c., from those occupying *jhum* lands in the vast and wild tracts lying beyond their estates. The Revenue Officers apparently considered that such assets should be made liable to the Government demand, although the *jhum* lands were not under settlement. This is the cause of the complication, which has arisen. It has led to the passing of the Regulation and it has also given rise to the difficulties in this suit in distinguishing lands inside and outside the estate, because ordinarily the assessment of Government revenue on the assets realized by the person in possession of the lands under settlement would be only on assets derived from the lands under settlement. The *Mouzaari* Registers amongst the *mouzas* forming portions of the *taluks* under Settlement do contain entries of *mouza Jhum*. But it is remarkable that whereas, in respect of other *mouzas* the quantity of land under cultivation and waste are given, in respect of *mouza Jhum* only the cultivated area is stated. This seems to show that, however these entries may be regarded, *mouza Jhum* did not include any definite area or tract of country which, as in the case of other *mouzas*, naturally would include lands both under cultivation and waste. This is of great significance having regard to the nature of lands held as *jhum*, for, as already stated, lands so held were variable, as there was no certainty that they would be so held after the crops grown on them were gathered in. They might be occupied or abandoned with absolute freedom.

" A *mouza* described as *jhum* would not be permanently settled for the assessment in respect to any definite and certain area, the inclusion of assets so realized from *jhum* lands would rather seem to indicate the amount at that time realized by the proprietor of the property under settlement as an appendage to that property, not necessarily as forming part of it, but as an asset realized by the *talukdar*, of which Government was entitled to a proportionate share in the settlement. The fact that these lands were described as *jhum* and were so added as appertaining to the *taluk* does not necessarily show that they were included as portions of the estate under settlement. To establish that it should be shown that these lands were within the limits of that estate. So far, therefore, in the determination of the question, the evidence relating to the settlement leaves the matter doubtful on which this suit depends.

" When the Revenue survey took place the disputed lands were designated as *mouza Jhum* and were included as part of the *pergunnah* Lungle, but this seems to have been cancelled and the lands were afterwards separately shown as outside this *pergunnah* and they were entered in a map described as the Frontier Circuit. In this map some lands are shown as occupied and apparently

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while not making the lands part of the estate, held that the proprietors by receiving rents, &c., from the *jhum* lands had rendered themselves liable *protanto* to pay a proportionate increase of revenue. This, in our opinion, properly represents what actually took place. The Subordinate Judge has, we think, correctly expressed the grounds, upon which the Board of Revenue acted, that is, so long as the *jhum* right of the *talukdars* continued in the lands, they could not be properly treated as *ilam* lands and liable to assessment as such. But the present position is now changed by the Regulation. Unless it can be shown that any *jhum* lands were included in the limits of the *taluk* permanently settled, the rights of the *talukdars* in respect of rents or dues derived from them are extinguished and the *talukdars* are entitled to receive compensation for the same.

"On these considerations we agree with the Subordinate Judge that he has failed to prove that the lands in suit lie within the boundaries of his permanently settled *taluks* and we accordingly dismiss the appeal with costs."

ON THIS APPEAL.

Sir R. Finlay K.C. and De Gruyther K.C. for the appellants contended that the lands in dispute appertained to their permanently settled estates, and that therefore they were lands to which Regulation III of 1801 did not apply. The word "*jhum*" meant a hill or forest village, and in such a village the cultivation would naturally be shifting, and there was nothing in the word itself, or in its use, to indicate that a hill or forest village could not form part of the Zemindar's estate, to which his title was recognized at the permanent settlement. The fact, which was shown by the *mouzawari* papers of 1801-1802, that the income derived by the owners of the permanently settled estates from the lands under *jhum* cultivation was taken into account with the income of the settled estates in determining the amount of revenue payable, showed that the *jhum* lands were considered a portion of, as being within the limits of, the settled estates. Bengal Regulations I of 1793, section 10, and VIII of 1793, sections 23-25, were referred to to show that only assets arising out of the settled estate itself could be taken into account in settling the revenue of an estate; and that therefore, as the income of the *jhum* lands had been taken into account, the presumption was that such lands belonged to the estate, the revenue of which had been so settled. Reference was also made to the *Mouzawari* Papers 1208 B.S. (1801-1802 A.D.), 1209 B.S. (1802-1803 A.D.)

and 1236 B.S. (1829-1830 A.D.); Field's Regulations, Ed. 1875, Introduction, page 41, as to the meaning of the word "*Mahal*," which was there defined as "an estate; land separately assessed with Government revenue. It is also used in a figurative sense of source of revenue not derived from land, e.g., the *ahkari* or excise *mahal*," Assam Land Revenue Manual by Gait, Ed. 1896, Sylhet Province, pages CXXVIII, CXXIX, CXXXII, CXXXIV, and CXXXVII: and the 5th Report of the Select Committee on the affairs of the East India Company, Madras, Ed. 1883, Vol. I, pages 14, 18, 21—23, 130, 139, 146, 147, 150, 568, 569, 571 resolution (5), 580, 585, 592, 609, 611, 613, 616, 630.

It was also contended that the onus was on the respondent, the Secretary of State for India in Council, to show that Regulation III of 1891 was applicable to the lands in dispute.

On the question of title the documents referred to in the statement of the facts of the case (1) were relied upon and it was contended that the evidence afforded thereby of the possession and enjoyment of the lands in dispute by the appellants and their predecessors was sufficient proof of their title. Since 1855 at any rate the possession and enjoyment of the lands by them had been continuous.

Cohen K.C. and *Ross* for the respondent, the Secretary of State for India in Council, contended that the appellants had failed to prove that the lands in dispute were included in their permanently settled estate. The onus of proof on this point had been rightly placed on the appellants, and moreover both the Courts in India had concurrently decided that they were not so included. It was true that the assets of the *jhum* lands were taken into account in estimating the assets of the Settled Estate for the purpose of ascertaining the revenue payable; but they were so taken into account as assets accruing to the owners, but derived, not from the Settled Estate, but from land lying outside it. It was submitted that the documentary evidence on the record taken as a whole clearly showed that the

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officers, who effected the permanent settlements of these estates, included, for the purposes of assessment among the assets of those estates under the name of *jhum*, the income then derived by the proprietors of those estates from shifting cultivation carried on by the proprietors or their defendants beyond the limits of those estates; and further that the areas of such cultivation were altogether undefined, and varied in different years. The lands so undefined could not be and were not included in the settled areas; and it was also submitted that this state of things was exactly what the Legislature contemplated, when Regulation III of 1891 was passed. See the preamble of the Regulation; Statute 33 Viet., C. 3, as to the effect of Regulations passed under it as was Regulation III of 1891; and the Assam District Gazetteer, "Sylhet," Vol. II, page 212.

As to the question of title it was contended that the appellants and their predecessors had not the entire interest in the land in dispute, but only enjoyed a partial and casual interest, and such rights as they exercised over it was not sufficient to prove the title they claimed as absolute owners: nor was the long adverse possession they set up, which had been decided against them.

De Gruyther K.C. in reply.

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The judgment of their Lordships was delivered by—

SIR ARTHUR WILSON. This is an appeal against a judgment and decree of the High Court of Calcutta, dated the 29th March 1904, which affirmed the judgment and decree of the Subordinate Judge of Sylhet, dated the 15th April 1899.

The question raised upon the appeal, is whether Regulation III of 1891, issued under the authority of Act 33 Viet., C. 3, can properly be applied in the case of certain lands known by the name of *Puher Pahar*.

The Regulation in question begins with a most useful preamble, which recites as follows:—

"Whereas the officers, who effected the permanent settlements of certain estates in the district of Sylhet included, for the purposes of assessment, among the assets of those estates under the designation of *jhum* the

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income then derived by the proprietors of those estates from shifting cultivation carried on by them or their dependants beyond the limits of those estates, and from tolls levied by them on forest-produce cut, gathered or enjoyed in places beyond the limits of those estates ;

" And whereas, inasmuch as the said cultivation and the operations of those who cut, gathered or enjoyed the said forest-produce shifted from year to year over immense and altogether undefined areas, the tracts of land, over which they extended, were not specified at the time of the settlement, and, in consequence of this, rights of various, and in some cases vague, descriptions are from time to time asserted by the said proprietors over immense and undefined areas ;

" And whereas it is thus impossible for any person to obtain a safe and clear title to land in those areas and the extension of cultivation is, in consequence, impeded ;

" And whereas it is expedient that the rights, if any, corresponding to the said *ghum* assets should be commuted."

Section 2 enacts that :—

" All rights . . in respect of which *ghum* . . assets were assessed in any permanent settlement of land, or which have been at any time acquired by virtue of or under cover of such assessment shall be deemed to have been extinguished."

And section 3 declares that all proprietors of such estates shall be entitled to compensation.

The nature of *ghum* cultivation is explained in an early official document relating to the hill lands in question .—

" The dastur of *ghum* cultivation is this : *ghum* is not cultivated in one place every year. When land is found anywhere within these boundaries *ghum* cultivation is made thereon, and after measurement and assessment the *Mirasdars* take the rest by apportionment according to their respective shares in the *ghum* revenue at the time of the *kastbud* measurement."

And that description seems to be correct to the present day.

After the passing of the Regulation the Government of Assam whose jurisdiction included Sylhet, issued and published orders in due course, extending the Regulation to the areas in question with others.

The question, therefore, raised in the case and discussed on this appeal is, whether the Regulation can be put in force with reference to the lands, to which it is sought to apply it. Those lands have undoubtedly been long in the enjoyment (such enjoyment as is practically possible under the circumstances

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of the case) of the appellants' predecessors in title. The Government claims to apply to these lands a Regulation, which would have the effect of confiscating proprietary rights, and giving compensation in exchange. Under these conditions their Lordships think it clear that it lies upon the Government to show that the facts of the case are such as to bring it within the operation of the Regulation, in other words, that the present case is one in which, at the Permanent Settlement, in making settlement of certain *taluks* with the appellants' predecessors in title, the officers of Government included, for the purposes of assessment, among the assets of those *taluks* the income derived by their owners from *jhum* cultivation carried on beyond the limits of the settled estate.

That the *taluks* now held by the appellants were settled at the Permanent Settlement is beyond dispute, and that in estimating the assets of those *taluks* the profits of the present *jhum* lands were then brought into account is also beyond dispute. But according to the appellants those profits were taken into account because the *jhum* lands formed part of the settled estate; while, according to the other side, the *jhum* land profits were taken into account as assets accruing to the owners of the settled estate, but derived from lands lying outside it. The question is, which of these views is to be accepted.

It was contended on behalf of the Secretary of State that the question, whether the *jhum* lands lay within or without the limits of the settled estates, was a question of fact, and that their Lordships should accept the concurrent findings of the two Courts in India. This contention their Lordships are unable to accept. In a sense the question is one of fact; but at every point in the process of reasoning considerations of law have to be regarded.

It was contended on the other side that, under the Regulations in force at the time of the Permanent Settlement, no assets could lawfully be taken into account in settling the *jama* of an estate, except those arising out of the estate itself; and that this consideration established a very strong presumption

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that in any individual case the course in accordance with law had been followed. But this contention was not, and in their Lordships' opinion effectually met, by a reference to the preamble of the Regulation under consideration. That preamble shows that the course said to have been impossible was in fact followed, rightly or wrongly, and followed in a number of cases sufficient to render legislation desirable. It remains, however, to consider, in each case that comes before the Courts, whether the facts bring the case within the operation of the Regulation.

The *taluks*, in which the lands in question are said to have been included, were, no doubt, settled at the decennial settlement, and that settlement was in due course made permanent. But as might be expected after so great a lapse of time, little now survives of the original official papers, and what does survive is not very easy to construe.

The most important of the early documents are certain *mouzawari* papers from 1801-02 onwards. These show clearly that, in assessing the *taluks*, the *jhum* assots were taken into account. But this, as has been shown, is a neutral fact consistent with the case of either party. Beyond this it is difficult to carry the effect of those papers.

Those papers were examined in detail by Counsel upon both sides on the argument of the appeal. It appears to their Lordships unnecessary to repeat that examination. It is enough to say that there are circumstances favourable to one side and circumstances favourable to the other, but that no confident conclusion could be drawn from these papers, either one way or the other.

Reliance was also placed upon certain *thakbast* maps, but these are equally inconclusive.

The only other matter, which remains to be considered, is the evidence as to possession and enjoyment of the lands in question on the part of the plaintiff and those, who preceded him. In the Courts in India the plaintiff sought to establish a title by adverse possession for sixty years. In this he was held to have failed, and on the argument of the appeal no such case

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was contended for, but the evidence of possession and enjoyment was relied upon as proof of title.

Regarded in this light, that evidence is important and it all points one way. It was shown that from as early as 1837 the appellants' predecessors in title received kahuliyats from persons carrying on *jhum* cultivation on the lands in question.

In 1842 and 1843 those predecessors in title succeeded in defeating an attempt to exercise rights over these lands on the part of the persons interested in an adjoining *mouzah*.

On several occasions in subsequent years the appellants' predecessors successfully resisted proposals on the part of Revenue Officers of Government to settle portions of these hill lands as *ilam* lands open for settlement. The most important instance was one that terminated in an order passed by the Board of Revenue (the highest Revenue Authority in the Province) dated the 14th September 1855. It had been proposed to offer for settlement a portion of the lands now in suit as *ilam* lands. This was objected to by the appellants' predecessors. The Collector overruled the objection, but the Board of Revenue, concurring with the Commissioner, reversed that finding, and on the ground, as their Lordships understand it, that the lands were included in the Permanent Settlement. After that the possession and enjoyment of the appellants and those, through whom they claim, seem to have been continuous.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, that the decrees of the Courts in India should be set aside with costs, and a decree made granting the appellants the declaration asked for by the plaint. The respondent, the Secretary of State, will pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellants: *T. L. Wilson & Co.*

Solicitors for the respondent, the Secretary of State for India:

The Solicitor, India Office.

ORIGINAL CIVIL

Before Mr. Justice Woodroffe

In the matter of WOOZATUNNESSA BIBEE.*

*Mahomedan Law—Wakf property—Jurisdiction.*1903
August 25

Under Mahomedan Law, the High Court has jurisdiction to authorise dealings with *wakf* property.

Shama Churn Roy v. Abdul Kabeer (1) followed.

ORIGINAL SUIT.

THIS was an application by a *mutwalli* under Act XXVII of 1866 and Act XXVIII of 1866 for the sanction of the Court to grant a lease of certain premises, which were the subject of a *wakf*, created by a *wakfnamah*, dated July 19th, 1905.

On July 19th, 1895 one Shamsul Ulama Moulvie Mahomed Illahallad, a Sunni Mahomedan of the Hanafi sect, who had established a mosque at No. 42, Moonshiee Alimuddin's Street in Calcutta, executed a *wakfnamah*, whereby he dedicated certain premises, including Nos. 13, 14, 20, Holwell's Lane, and No. 105, Old Boytokhana Bazar Road, within the jurisdiction of this Court, as also certain premises outside the jurisdiction of this Court, to the purposes of this mosque. By the *wakfnamah* he appointed himself the first *mutwalli* of the trust and directed that, after his death, his widows should be *mutwallis* in succession in the order of the dates of their respective marriages.

Moulvie Mahomed died intestate on April 24th, 1901, leaving three widows, the petitioner, Musarrat Woostunnessa Bibee, a Sunni Mahomedan of the Hanafi sect, the first, and two others, a daughter and a sister. He was under the Hanafi School of Mahomedan Law. The petitioner as the eldest widow came into possession of the premises on the 1st of January, 1902, and on March 19th, 1904, she obtained the sanction of the Court to lease the premises for a term of years.

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the property and credits of the deceased. The premises Nos. 13, 14 and 20, Helwell's Lane, and No. 105, Old Beytokhana Bazar Road, dedicated to the *wakf*, were covered with tiled huts and yielded a monthly rental of Rs. 90-8.

On March 8th, 1908, the petitioner, with the object of disposing of the trust property in a mere beneficial manner, agreed to grant a lease of these premises, for a period of 30 years, at a rental of Rs. 130 per month subject to the sanction of this Court. It was the grant of this lease that the petitioner now applied to the Court to sanction.

Mr. B. C. Mitter for the petitioner. Under Mahomedan Law, this Court is vested with the powers exercised by the Kazi under the Mahomedan régime, and can sanction dealings with *wakf* property. Before any alienation of *wakf* property can be made by a *mutwalli*, the sanction of the Kazi or, in other words, of a Judge of this Court is essential. See *Shama Churn Roy v. Abdul Kabeer* (1). A similar order was made by Stephen J. in *In the matter of a wakfnamah, dated May 30th, 1896* (2).

WOODROFFE J. I will make an order in terms of the prayer of the petition, not under the Acts, which head the petition, but on the authority of *Shama Churn Roy v. Abdul Kabeer* (1), which lays down that this Court has jurisdiction under Mahomedan Law to authorise dealings with *wakf* property. A similar order was made by Mr. Justice Stephen on the 2nd July 1906.

The petition shows that the present rent is Rs. 90-8, less taxes, and this has to be recovered from a number of small tenants. It is now proposed to let the property at a rental of Rs. 130 to one tenant for 30 years. This appears to me to be beneficial. I make the order and give liberty to the applicant to carry out the arrangement.

Attorneys for the petitioner : *Alum and Mitter.*

APPELLATE CIVIL.

Before Mr. Justice Coxe and Mr. Justice Doss.

AYATUNNESSA BEEBEE

v.

KARAM ALI.*

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July, 15.

□ Mahomedan law—Divorce—Marriage contract stipulating wife's option to divorce herself on husband marrying again, when to be exercised.

When a power is given to a wife by the marriage contract to divorce herself on her husband marrying again, if the husband does marry again, she is not bound to exercise her option at the very first moment she hears the news.

The injury done to her is a continuing one and she should have a continuing right to exercise the power.

The case is different when such a power is given to the wife after marriage.

Meer Ashruf Ali v. Meer Ashad Ali (1) and *Nuruddin v. Mussummat Chenuri* (2) followed. *Hamidoolla v. Faizunnissa* (3) applied.

APPEAL by defendant No. 1, Ayatunnessa Beebee.

Karam Ali Kagzi, the plaintiff, married the defendant No. 1, Ayatunnessa Beebee, on the 11th Srahan 1305. After they had lived together for 5 years without any issue, he married again, in order to obtain issue, at the wish of defendant No. 1, as it is alleged by the plaintiff and denied by the defendant No. 1. It was further alleged that defendant No. 1 had lived with the plaintiff for a year thereafter and was then taken away by defendants Nos. 3 and 4 in plaintiff's absence, in Asarh 1310, and that since then the defendants were not allowing her to come to the house of the plaintiff.

The defendant No. 1 admitted the marriage and pleaded *inter alia* divorce, which took place on the 27th Aughran 1311 in exercise of the power given to her by him before marriage.

The Subordinate Judge decreed the suit on the ground that Mahomedan law does not favour such rights and that the

* Appeal from Original Decree No. 392 of 1906, against the decree of J. C. Das, Subordinate Judge of Dacca, dated the 30th June 1906.

(1) (1871) 16 W. R. 260.

(2) (1903) 3 C. L. J. 49.

(3) (1882) L. L. R. 8 Calc. 327.

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option to divorce being delegated on the happening of a condition and no time being specified, within which the option should be exercised, it should have been done immediately on hearing that the condition had happened

Mou vi Serajul Is'am, for the appellant. Plaintiff cannot succeed, as he has broken a condition of the marriage contract, on which the defendant according to the contract has divorced herself. She had an option given to her, which did not become inoperative by reason of her not exercising it at once. *Hamidulla v. Faizunnissa* (1) and *Meer Ashruf Ali v. Meer A-had Ali* (2).

Dr. Priyanath Sen, for the respondent. According to Mahomedan law, such a conditional power must be exercised as soon as the condition is fulfilled. It cannot be kept in reserve, unless the power itself prescribes the time, within which it may be exercised. See *Ameer Ali's Mahomedan Law*, Vol. II, 3rd ed., p. 431; *Baillio's Digest*, 2nd ed., p. 250; *Hedaya* by Grady, 2nd ed., p. 90 and *Wilson's Anglo-Mahomedan Law* 2nd ed., p. 163. The case of *Meer Ashruf Ali v. Meer A-had Ali* (2) is distinguishable, inasmuch as there the condition on which the option to repudiate was given to the wife, was 'the keeping of a concubine', and his was a wrong of a recurring character, so that the failure to repudiate on one occasion would not debar the exercise of the right to repudiate, when the occasion arises again. In the present case the wrong done to her could not be of a recurring nature, and she should have exercised her rights as soon as she came to know of the intention to remarry. Evidently she did not make up her mind then to exercise the right and waived it. She could not again exercise it. [Does J. May not the passages in the text-books relate to post-nuptial delegation of power?] The Mahomedan Law makes no distinction between ante-nuptial and post-nuptial delegation of power, and by that law, delegated powers must be exercised as soon as possible and in the

strict form enjoined by that law. In *Hamidoolla v. Faizunnissa* (1) this question was not at all discussed, the main contention there being that the delegation of power to the wife was invalid except on certain specified occasions, and there the Court held that such delegation was not contrary to Mahomedan law.

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COXE AND DOSS JJ. This appeal arises out of a suit for the recovery of a wife.

The defence is that at the time of the marriage it was stipulated between the parties that in the event of the husband taking another wife the wife should have the power to divorce herself and that in the exercise of that power the defendant divorced herself in December 1904.

The Subordinate Judge has found that the stipulation was made and that the plaintiff broke it by marrying a second time. But he has held that the divorce is invalid, because the defendant did not exercise the option given to her immediately on hearing of the second marriage. The Subordinate Judge accordingly decreed the suit.

The wife appeals. The learned vakeel for the appellant relying on the decision in *Meer Ashraf Ali v. Meer Ashad Ali* (2) argues that the wife did not lose her option of declaring herself divorced by reason of the delay between the time, when she heard of the second marriage of her husband and the time, when she exercised her right. We cannot see that there is any real distinction between the case cited and the present one. If we follow that decision we are bound to hold that the defendant's divorce was valid and the suit must necessarily fail.

The learned pleader for the respondent has relied upon the authorities cited in the judgment of the learned Subordinate Judge and on certain passages in Wilson's *Anglo-Mahomedan Law*, second edition, page 163. But the passages, which have been read to us from these authorities, appear to deal only with cases in which the husband has, after marriage, given his wife the option of declaring herself divorced.

(1) (1892) I. L. R. 8 Cal. 327.

(2) (1871) 16 W. R. 260.

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option to divorce being delegated on the happening of a condition and no time being specified, within which the option should be exercised, it should have been done immediately on hearing that the condition had happened

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(1) (1832) L. L. R. 8 Calo. 327.

(2) (1871) 18 W. R. 260.

strict form enjoined by that law. In *Hamidoolla v. Faizunnissa* (1) this question was not at all discussed, the main contention there being that the delegation of power to the wife was invalid except on certain specified occasions, and there the Court held that such delegation was not contrary to Mahomedan law.

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 AYATUN-
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The Subordinate Judge has found that the stipulation was made and that the plaintiff broke it by marrying a second time. But he has held that the divorce is invalid, because the defendant did not exercise the option given to her immediately on hearing of the second marriage. The Subordinate Judge accordingly decreed the suit.

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The learned pleader for the respondent has relied upon the authorities cited in the judgment of the learned Subordinate Judge and on certain passages in Wilson's Anglo-Mahomedan Law, second edition, page 163. But the passages, which have been read to us from these authorities, appear to deal only with cases in which the husband has, after marriage, given his wife the option of declaring herself divorced.

(1) (1862) L. L. R. 8 Calc. 327

(2) (1871) 16 W. R. 260.

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In Wilson's Anglo-Mahomedan Law, page 168, it is stated—
 “It is a fact that nearly all of what is said on the subject in the Fatawa Alamgiri and the Hedaya has reference to permission given by the husband to the wife after marriage to divorce herself at her option in specified contingencies.” The cases referred to are therefore different from the case now before us in which the parties entered before marriage into this contract that the wife should have power to divorce herself under certain circumstances. This stipulation was a most important element in the marriage contract. That the above is a true distinction appears to be accepted in *Hamidoolla v. Faizunnissa* (1), in which the learned Judges say, “The Mahomedan law on the subject, which has been laid before us, provides for the delegation of the power of divorce by the husband to the wife on certain occasions by word of mouth, but it in no way, so far as it has been laid before us, limits the exercise of that power to those occasions * * * * * We are aware of no reason, why an agreement entered into before marriage between parties able to contract, under which the wife consented to marry on condition that, under certain specified contingencies, all of a reasonable nature, her future husband should permit her to divorce herself under the form prescribed by Mahomedan law, should not be carried out.” We agree with this decision and think that we are not bound in dealing with a stipulation in a marriage contract, to be governed strictly by the rules laid down in the passages, which have been read to us, which deal with the exercise of the power of divorce by a wife, when an option is given by a husband after marriage. We think that, when a power is given to a wife by the marriage contract to divorce herself on her husband marrying again, then, if her husband does marry again, she is not bound to exercise her option at the very first moment she hears the news. The injury done to her is a continuing one and it is reasonable that she should have a continuing right to exercise the power. This was the view taken

by the Court in the case of *Meer Ashruf Ali v. Meer Ashad Ali* (1), which has already been cited. And that view was followed in *Nuruddin v. Mussummat Chenuri* (2), in which it is clear that the wife exercised the power of divorcing herself some time after the contingency, which gave rise to it, occurred.

On reading the evidence we do not think that the delay, which the wife made in this particular case, was under the circumstances unreasonable.

Accordingly we must hold that the divorce was valid and the suit should have been dismissed.

The appeal is accordingly allowed with costs in both the Courts.

Appeal allowed.

(1) (1871) 16 W. R. 260.

(2) (1905) 3 C. L. J. 49.

ORIGINAL CIVIL.

Before Mr. Justice Woodroffe.

GANODA SUNDARY CHAUDHURANI

v.

NALINI RANJAN RAHA.*

1908

August 24.

Trespass—Court of Wards, powers of—Mal-administration—Court of Wards Act (Bengal Act IX of 1879)—“Proprietor”—Infant beneficiary, residuary legatee when “proprietor”—Executrix, position of—Possession—Continuing trespass—Injunction—Civil Procedure Code (Act XIV of 1882) s. 424—Notice of suit, whether necessary, where Public Officers are sued in individual capacity, or injunction sought—Jurisdiction—Immovable property—Acquisition by executrix—Trespass under order of higher official,

Thirteen years having elapsed since the death of the testator, and the administration by the executrix of his estate, which consisted of immovable property in Eastern Bengal and Assam, not being complete, and there being a suggestion of mal-administration, the Court of Wards of Eastern Bengal and Assam declared the infant beneficiary a minor under the Act, declared its determination to take the estate under its charge as the property of the minor, and directed that possession be taken of the property on its behalf.

Subsequent to this declaration the executrix purchased a house in Calcutta for the estate and out of the assets of the estate.

The officers appointed by the Court of Wards proceeded to execute its directions, they collected and appropriated rents, the collection, however, being made in the name of the executrix as mutation of names had not been effected, and they took over the establishment of the executrix in the absence of the executrix, without her consent and in spite of her protest.

On a suit being instituted without notice under s. 424 of the Code of Civil Procedure by the executrix against the officers in their private individual capacity as trespassers, for a declaration of her title and for an injunction:—

Held, the Court of Wards can only take possession of the estate of a minor, if he can be said to be its “proprietor” within the meaning of the Court of Wards Act. The residuary legatee does not become “proprietor,” until after administration has been completed, and the residue ascertained and made over to him. The Court of Wards has no power under its Act to override the wishes of testators and proprietors generally. The Court of Wards has no power to determine whether there had been mal-administration by the executrix, and on its own determination to take possession of the property vested in the executrix. Mal-administration by the executrix was no ground for taking possession by the Court of Wards.

* Original Civil Suit No. 641 of 1908.

In the circumstances of the case, possession of the estate really remained with the plaintiff, and there was a continuing trespass against which the plaintiff was entitled to relief by way of injunction.

Section 424 of the Code of Civil Procedure has no application where public officers are sued not in an admitted official capacity, but as individual trespassers, nor so far as a suit seeks for relief by way of injunction.

The High Court may entertain an action in respect of immovable property, provided a portion of such property is within the jurisdiction. It is not necessary that the cause of action should arise within the local limits, or be specifically with reference to the portion of the property, within those limits.

An acquisition of property for the estate by the executrix, by purchase out of the assets of the estate formed part thereof, although the purchase took place after the declaration of the Court of Wards taking over charge of the estate.

A trespass committed by order of a higher official is in substance the act of that official, who can be sued as a trespasser.

ORIGINAL SUIT.

THE plaintiff Sreemutty Ganoda Sundary Chaudhurani, the widow and executrix of one Mohun Chandra Roy Chaudhury, a zemindar of Atharbari in the District of Mymensingh, in the Province of Eastern Bengal and Assam, instituted this suit without notice against Nalini Ranjan Raha, J. R. Blackwood, and R. Nathan described in the plaint as gentlemen, praying *inter alia* (3) for a declaration that she was entitled as executrix to retain and be maintained in the peaceful possession and management of the estate of her deceased husband including a certain property in Calcutta, (4) for an injunction forthwith restraining the defendants, their servants and agents from interfering in any way whatsoever with the management and possession of the said estate by the plaintiff or otherwise intermeddling therewith, until the final determination of this suit, (5) for an injunction restraining the defendants from further proceeding with the application for substitution of names in place of the plaintiff in suit No. 38 of 1908 in the Court of the 3rd Munsif of Mymensingh or with any similar application for substitution that may have been made in any other Civil Court and from making any such applications, and also from further proceeding with the application for registration of names under Bengal Act VII of 1876, in the Collectorate of Mymensingh and also from making any similar

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application for registration in the Collectorate of Mymensingh or other district in respect of any revenue paying property belonging to the said estate, until the final determination of this suit, and (0) for an injunction perpetually restraining the defendants, their servants and agents from interfering in any way whatsoever with the management and possession of the said estate by the plaintiff or otherwise intermeddling therewith.

In January 1895, Mohun Chandra Roy Chaudhury died possessed of a considerable estate in the province of Eastern Bengal and Assam, and leaving a Bengali will, dated 2nd October 1890, whereby he appointed his widow, the plaintiff, his executrix.

The 8th clause of the will was as follows: "If any adult son of mine or a son of my loins or adopted son among my sons be living at the time of my death, the said adult son or the oldest among the sons shall be the executor. Failing him my wife Sreemutty Ganoda Sundari Chaudhurani shall be the executrix of this my will. . . . whoever other than the son of my loins or my adopted son shall be my executor or administrator, shall remain confirmed in the office, until the son of my loins or my adopted son attains majority. On the son attaining majority my property and the charge of performing the acts intended by me mentioned in the will shall devolve on him subject to the provisions of this will." On May 8th, 1895, the plaintiff obtained probate of this will from the District Court of Mymensingh, and took possession of the estate of the testator.

As early as 1884 the testator had by deed given the plaintiff power to adopt a son, and in May 1899 the plaintiff adopted Promode Charan Roy Chaudhury, an infant about two years old, as a son to her deceased husband.

It was alleged by the plaintiff that the testator died indebted to the extent of about seven lacs of rupees, and that she had reduced the debt by about two lacs by the date of suit, but that the administration of the suit was not yet complete.

By an order of the Board of Revenue of Eastern Bengal and Assam, dated 23rd April 1908, passed under the provisions of the Court of Wards Act of 1879, the Court of Wards declared Promode Charan Roy Chaudhury a minor under the Act, and declared its determination to take under its charge the property of the minor, and directed that possession be taken of such property on its behalf.

By a further order of the same Board, also dated April 23rd, 1908, the Court of Wards appointed the Commissioner of the Dacca Division and the Collector of Mymensingh to be respectively the "Managing Commissioner" and "Managing Collector" of the estate of the minor, and authorised the appointment of a Deputy Collector to be put in charge of the estate as "Manager." The defendants R. Nathan and J. R. Blackwood were at the date of the orders of April 23rd, 1908, respectively Commissioner of the Dacca Division, and Collector of Mymensingh, and in pursuance of the orders the defendant Nalini Ranjan Raha, a Deputy Collector, was on June 2nd, 1908, appointed Manager under the Court of Wards of the estate of the minor.

On June 3rd, 1908, there appeared in the *Eastern Bengal and Assam Gazette* a notification, dated May 27th, 1908, to the effect that the Court of Wards of Eastern Bengal and Assam had declared Promode Charan Roy Chaudhury a minor, and had assumed charge of his property, and requiring creditors to submit their claims to the Court of Wards at the office of the Board of Revenue at Dacca.

It was of this order, which was brought to her notice on June 4th, 1908, that the plaintiff complained. She alleged that since the death of the testator she had been and still was in possession of the estate of the testator, which included amongst other properties, No. 6, Bechoo Chatterjees Street, in Calcutta. This property was purchased by the executrix for the estate and out of the assets of the estate, but subsequent to the declaration of the Court of Wards. The plaintiff submitted that the estate left by the testator was legally vested in her as executrix, that she was recorded as such in the books

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of the Collectorato, and that by declaring Promode Charan Roy Chaudhury a Ward of Court, the Court of Wards had not acquired and could not acquire any jurisdiction or right to take over the estate or to affect her right to the estate or to interfere with her possession and management. She further alleged that, acting under the orders and directions of the other two defendants, the defendant Nalini Ranjan Raha on June 8th, 1908, wrongfully entered into her kutcherry at Atharbari and was at the date of suit trying to assume management of the estate and was attempting to interfere with the collection of rents of the estate by herself and her servants, that on July 2nd, 1908, he applied in the Court of the 3rd Munsif at Mymensingh to have the name of Promode Charan Roy Chaudhury as a Ward of Court through himself as next friend substituted in the place of her own name in a rent suit No. 38 of 1908, and that on July 7th, 1908, he applied before the Collector of Mymensingh for the registration of his name as manager under the Court of Wards in respect of several revenue paying properties belonging to the estate in the district of Mymensingh. The plaintiff charged that the three defendants acting in conspiracy and collusion wrongfully denied her right as executrix to the testator's estate and her right to the possession and management thereof, and were attempting to oust her from her office as such executrix, and threatening to obtain possession of the estate including the property in Calcutta, the tenant of which had been called upon to pay his rent to the defendant, Nalini Ranjan Raha.

The Deputy Collector alleged that, acting under the instructions of the "Managing Collector", on June 8th, 1908, he proceeded to Atharbari and took charge of all the documents of title, books of account and papers of the estate and that since that date he had been in actual possession of and carried on the management of the estate as manager under the Court of Wards.

The Deputy Collector collected and appropriated rents of the estate, the collection being made in the name of the executrix, as the mutation of names on the register had not been

effected, and took over the establishment of the executrix. This was done in her absence and without her consent and the executrix protested against the proceeding, and continued collecting rents herself on her own account.

The defendants denied the charges of conspiracy and collusion or that they had ever attempted or threatened to take possession of the property in Calcutta, or done any acts in reference thereto and alleged that the acts done by the "Managing Commissioner" and the "Managing Collector" in the appointment of the Deputy Collector as "Manager", and the taking possession of and assuming and retaining the management of the estate were lawfully done by them in pursuance of the orders of the Board of Revenue, in the discharge of their duty and in good faith, and that the acts done by the Deputy Collector, were similarly done in obedience to the lawful orders of his superior officers, which he was bound to execute. The defendants submitted that at the time of the orders of April 23rd, 1908, the estate was not vested in the plaintiff, that the plaintiff was only acting as manager for and on behalf of the minor, that the minor was the sole proprietor of the estate, and that under the orders of the Court of Wards the estate of the minor came into the lawful charge of the Court. It was admitted by the defendants that at the time of the declaration, the administration of the estate was not complete, but it was suggested, there had been unnecessary delay and mal-administration on the part of the executrix. On the institution of this suit, the plaintiff obtained a rule for an injunction, which came on for hearing on August 3rd, before Woodroffe J., and on August 4th, the further hearing of the rule was adjourned, until the hearing of the suit, which was expedited.

The Advocate-General (Mr. Sinha), (The Standing Counsel, Mr. W. Gregory, and Mr. Eggar with him) for the defendants. This suit has been instituted against public officers purporting to act in their official capacity and hence is not maintainable in the absence of notice under section 424 of the Code of Civil Procedure. The interpretation of section 424 cannot be

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deduced by reference to English cases on English statutes, where both the language and intention may be different. See *The Secretary of State for India in Council v. Rajlucki Debi* (1). The object of section 424 is to bring to the notice of an official that legal proceedings are threatened and to give him an opportunity to retraco his steps, or restrain his action. Hence section 424 would apply equally well to a rule for an injunction as to a suit. Further, before the plaintiff can obtain an injunction, she must shew that irreparable damage would be caused otherwise. Again this suit for an injunction is not maintainable, as the Court of Wards obtained actual possession of the estate on June 8th, 1908, before this suit was filed. The plaintiff's proper remedy, if any, would be under section 45 of the Specific Relief Act for relief in the nature of a mandamus. This Court has no jurisdiction to entertain this suit. The whole of the estate of the testator at the date of the declaration lay outside the jurisdiction. The Calcutta property was purchased recently after the declaration and hence did not vest in the plaintiff as executrix as part of the testator's estate. Moreover the Court of Wards of Eastern Bengal and Assam did not and could not under the Act take possession of the Calcutta property. The Court of Wards has power to determine for itself, whether there has been mal-administration of an estate, and on its own determination to take charge of an estate, before administration is complete. See section 5 of the Court of Wards Act. The executrix was not the "proprietor" of the estate within the meaning of the term in sections 6 and 7 of the Court of Wards Act. Though the estate may vest in an executor as such, the ownership is not in him. See section 4 of the Probate and Administration Act. By the term "proprietor" is meant the person beneficially entitled, in this case the infant. The testator's will, a Bengali will, should not be construed too strictly. See *Josephine Rose Harries v. Edward Brown* (2). The plain and ordinary meaning of the clause in the will appointing the plaintiff executrix

(1) (1897) I. L. R. 25 Calc. 239, 244.

(2) (1901) 5 C. W. N. 729.

was that the plaintiff should merely be the manager of the estate for the benefit of the minor, until he attained his majority. See *Taran Singh Hazari v. Ramratan Tewari* (1). *Dal Koer v. Punbas Koer* (2) was also referred to.

Mr. Chakravarti (*Mr. B. C. Mitter* and *Mr. D. N. Basu* with him) for the plaintiff. Section 424 of the Code of Civil Procedure has no application to this suit. The suit was instituted against the defendants in their private individual capacity as trespassers, and not in their official capacity. The acts of the defendants were not authorised by any statutory enactment. The defendants could not be said to be acting under the Court of Wards Act, in taking possession on behalf of the minor, of the estate, of which the plaintiff-executrix was "proprietor." See *Raleigh v. Goschen* (3), and *Bainbridge v. The Postmaster General* (4). Section 424 is intended to apply only to those cases, where the title or jurisdiction of the public officer is admitted, and the loss caused has been due to some irregularity, mistake or inadvertence on his part. Notice would be necessary to give the officer an opportunity to meet the claim without the annoyance of a suit. See *Shahbazadee Shahunshah Begum v. Fergusson* (5), and *Chunder Sikhur Bundopadhyay v. Obhoy Churn Bagchi* (6). *The Secretary of State for India in Council v. Rajlucky Debi* (7), cited on behalf of the defendants was referred to, and not confirmed in *Manindra Chandra Nandi v. Secretary of State for India* (8). Again section 424 can have no application to a suit, where an injunction is sought. The section requires notice of suit to be given "in respect of an act purporting to be done." The relief sought by way of injunction here is against an act that is threatened and not complete. The possession of the estate remained in the plaintiff and the defendants were in the position of continuing trespassers. If in a suit for an injunction two months' notice were necessary, the mischief apprehended may be done before the suit could be filed. See *Flower v. Local*

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(3) [1898] 1 Ch. 73.

(4) [1906] 1 K. B. 178.

(5) (1851) I. L. R. 7 Calc. 499.

(6) (1850) I. L. R. 6 Calc. 8.

(7) (1897) I. L. R. 25 Calc. 239.

(8) (1907) I. L. R. 31 Calc. 257, 251.

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Board of Low Leyton (1). In *Hari v. Secretary of State for India* (2) it was held that notice of suit was necessary, on the express assumption that in the circumstances of that case no injunction could be claimed. See also *Manohar Ganesh Tambekar v. Dakor Municipality* (3), *Municipality of Parola v. Lakshmandas* (4), *Sardarsingji v. Ganpatsinghi* (5), *Dewakabai v. Mun. Com. of Bombay* (6).

This Court had jurisdiction over this matter. A portion of the estate, that is the Calcutta property, lay within its local jurisdiction. It is not necessary that the threats should have been made within the jurisdiction, or with reference to the portion within the jurisdiction, although we do allege that our possession of the Calcutta property was in fact threatened.

To give this Court jurisdiction, it would be enough if portions of an estate outside the jurisdiction were threatened, if a portion of the same estate lay within the jurisdiction of this Court. It was quite immaterial that the Calcutta property was purchased for the estate subsequent to the declaration. The assets, with which it was purchased, formed part of the estate: hence the property itself belonged to the estate. An acquisition by the executrix must form part of the estate.

The suggestion that the Court of Wards of Eastern Bengal and Assam had no power to take possession of property outside its jurisdiction is wrong. Sections 6, 7 and 11 of the Court of Wards Act show, that the jurisdiction is personal and in a proper case that Court would have such power. See *Lachmi Narain v. Fateh Bahadur Singh* (7).

The minor was not the "proprietor" of the estate within the meaning of the term in the Court of Wards Act. The beneficiary under a will cannot become "proprietor" until after administration is complete and the residue ascertained. See *Chatterput Singh v. Maharaj Bahadur* (8). The Court of Wards has no power to administer an estate and cannot obtain grant

(1) (1877) L. R. 5 Ch. D. 347.
(2) (1903) I. L. R. 27 Bom. 424, 450.
(3) (1896) I. L. R. 22 Bom. 289, 294.
(4) (1900) I. L. R. 25 Bom. 142, 150.

(5) (1889) I. L. R. 14 Bom. 335, 338.
(6) (1904) 6 Bom. L. R. 1028, 1030.
(7) (1902) I. L. R. 25 All. 195.
(8) (1904) I. L. R. 32 Calc. 198, 218.

of letters of administration *See Ganjessur Koer v. The Collector of Patna* (1). The Court of Wards has no power to determine, whether there has been *devastavit*, and to take over charge of an estate on its own determination. In doing so the Court of Wards would be usurping the authority of a Civil Court.

The action of the Court of Wards was entirely highhanded and the plaintiff is entitled to an injunction. *See Colls v. Home and Colonial Stores, Limited* (2). If this Court is of opinion that the defendants did actually obtain possession of the estate, such possession was not legal possession and merely amounted to a continuing trespass; it would be unnecessary for the plaintiff to file a suit in ejectment and she was entitled to an injunction. *See Goodson v. Richardson* (3), which was followed in *Eardley v. Granville* (4) and *Allen v. Martin* (5). See also *Battersea Vestry v. County of London and Brush Provincial Electric Lighting Company, Limited* (6), and *Harrison v. Duke of Portland* (7). The plaintiff is entitled to relief against each one of the three defendants personally and individually. *See Raleigh v. Goschen* (8). *Hext v. Gill* (9) was also referred to.

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Cur. adv. vult.

WOODROFFE J. The plaintiff is the widow of Mohun Chandra Roy Chaudhury, zemindar of Atharbari, who was possessed of extensive zemindaries in Mymensingh. He died thirteen years ago in January 1895, leaving a will, of which he appointed the plaintiff executrix. The latter obtained probate on the 8th May 1895. Prior to his death he gave power to adopt and the plaintiff has adopted a son to him, Promodo Charan Roy, now about 11 years old. The estate

(1) (1898) L. R. 25 Calc. 795.

(2) [1904] A. C. 179.

(3) (1874) L. R. 9 Ch. App. 221, 224, 225.

(4) (1876) L. R. 3 Ch. D. 826, 832.

(5) (1875) L. R. 20 Eq. 462, 467.

(6) [1899] 1 Ch. 474, 481.

(7) [1893] 1 Q. B. 142.

(8) [1898] 1 Ch. 73.

(9) (1872) L. R. 7 Ch. App. 692.

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was at the testator's death and now is in debt and certain directions of the testator have not yet been carried out. The plaintiff says that she in May 1908 came to learn that the Court of Wards of Eastern Bengal intended to take possession of the estate. On the 3rd June 1908 that Court issued a notification assuming charge of the estate in suit, which was described to be the property of the minor.

It is of this order that the plaintiff complains. She says that the estate is vested in her as executrix and it is not the property of the minor so as to enable it to be taken possession of under the Court of Wards Act. She seeks to avoid a threatened interference with her possession. The suit is not against the Court of Wards, but against these defendants, who are sued in their individual capacity. The first defendant is a Deputy Collector at present on deputation as Manager under the Court of Wards of the estate in suit. The second defendant is the Collector and District Magistrate of Mymensingh and is Managing Collector. The third defendant is the Commissioner of the Dacca Division and is Managing Commissioner. As I have said the suit is not against them in their official capacity, but in their private individual capacity as alleged trespassers. They are sued not because of, but in despite of the fact that they are public officers. The suit as originally framed proceeded on the assumption that the plaintiff was in possession. It asked for retention in and maintenance of possession and for an injunction restraining interference with such alleged possession. At the trial Counsel for the plaintiff asked to amend the plaint so as to ask for recovery of possession should the Court hold (which is not admitted) that the plaintiff was not in possession of the estate or some part of it. No notice of suit has been given. All the estate is without the jurisdiction with the exception of a small parcel, which is stated to belong to it and which was purchased for Rs. 10,000 out of funds belonging to the estate some short time ago, namely, a house in Calcutta, 6, Bechoo Chatterjee's Street.

The first objection taken is that the suit is bad, because no notice has been given and it is contended that notice is neces-

sary under section 424 of the Civil Procedure Code. It is argued, however, that section 424 has no application as the defendants are not sued in an admitted official capacity, but as individual trespassers. I think this contention is correct. But apart from this and assuming that the section was otherwise applicable, it would not, I think, apply, so as to render notice necessary so far as the suit seeks relief by injunction. The section doubtless says "in suit" but it also speaks of an act "done" and would not therefore apply to prohibit a suit for an injunction to restrain the commission of an act not done, but threatened to be done. And it has been so held. Were this not so a party would be deprived of relief: as the threatened act might and probably would take place before the expiry of the period of two months. I hold therefore that no notice is necessary. The second preliminary objection is that, even if notice is not necessary, the Court has no jurisdiction to entertain the suit. In my opinion it has. This is not a case in which jurisdiction is sought to be founded on the fact that a portion of the cause of action arose within the jurisdiction, in which case it might be necessary to prove that the threatened disturbance of possession took place within the local limits. Evidence has been tendered to meet the denial of the defendants that they are threatening to obtain possession of the Calcutta house and their allegation that the Court of Wards of Eastern Bengal have in fact no power to take charge of the house in this province except through the intervention of the Bengal Government; a matter, I may here interpose, of mere machinery. It is in fact charged that the allegation in the 13th paragraph of the plaint was made only with a view to give this Court jurisdiction to entertain the suit. The plaintiff has on the other hand sought to prove that the defendants have attempted to interfere with the plaintiff's possession of the Calcutta house.

It is said that the first defendant asked Kader Nath Ray, an employee of the Atharbari estate to write to ascertain the rent paid for the Calcutta house, and to demand payment of the rent. This is denied. A letter was then written by the Naib

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Krishna Das Chaudhury to the tenant of the Calcutta house. This man was formerly in the service of the estate and was with other servants continued by the Court of Wards. This letter purports to be written on behalf of the Court of Wards and claims payment of rent. This was followed by a letter from the tenant to the plaintiff, in which he writes that he owes rents, but that as he has received a letter directing him to pay to the Court of Wards manager, he says :—" I cannot decide whether I should send rent to the said Babu."

I have not heard the plaintiff's Counsel's argument as to this part of the case and I express no opinion on it so far as it consists of the evidence of the plaintiff's witnesses, as in my opinion a finding on it is immaterial, the Court possessing jurisdiction for the reasons to be stated. I may however in passing point out that apart from this evidence Exhibit I constitutes a threat against the Calcutta property, which the first defendant appears to have been desirous of dealing with, as also the second defendant, the direction of the latter to *wait* having, I think, been given in order that mutation of names might be first effected.

It is well settled that this Court may entertain an action in respect of immoveable property provided that a portion of such property is within the jurisdiction. This no doubt is contested on the ground that, though there is a house in Calcutta, it was purchased after the Court of Wards' declaration and does not, it is said, belong to the estate. This contention however is in my opinion not well founded. The assets, with which it was purchased, formed part of the estate and that, into which the assets were converted, whether before or after the declaration, equally belong to the estate. An acquisition by the executrix for the estate is part of it. And this is so as regards the defendants none the less that as between the executrix and the ultimate beneficiary, the latter might for one reason or other challenge or refuse to adopt the conversion effected. This being so a portion of the estate is in Calcutta. The suit seeks first a declaration and as portion of the estate, in respect of which that declaration is sought, is within the local

limits, this Court can grant a declaration as regards the whole estate. And for the same reason it may grant an injunction. A distinct threat has been made and attempted to be given effect to in respect of the estate without the jurisdiction, that is against an estate, a portion of which is within the local limits. It is not necessary, as I have said, that that threat should either have been made or attempted to be given effect to within the local limits or specifically with reference to property within those limits. I hold therefore that this Court has jurisdiction to entertain the suit. But then it is said that relief should be by ejectment it being contended that the Court of Wards have already taken possession, the amendment, which I allowed, being the subject of objection. Undoubtedly there has been a disturbance of possession. Some rents and other monies have been collected and appropriated and the plaintiff's establishment directed to obey the order of the defendant appointed manager. But these rents have been collected in the name of the plaintiff and necessarily so, until mutation of names has been effected, which has not yet been done. The money orders cashed were in the plaintiff's name and the establishment was taken over in the plaintiff's absence and without her consent. Indeed she protested at once and has since made certain collections on her own behalf. Since the rule all collections on either side have stopped. There has been, therefore, in my opinion no such possession as would disentitle the plaintiff to an injunction and necessitate resort to an action of ejectment. I am of opinion that possession has really remained with the plaintiff, though there has been a continuing trespass, against which she is entitled to relief by way of injunction. I now come to the merits and as regards these the plaintiff has in my opinion a very clear case. The Court of Wards can only take possession of the estate, if the plaintiff's minor adopted son can be said to be its "proprietor" within the meaning of the Court of Wards Act. That term is not defined and it is therefore necessary to ascertain its meaning in this connection. It is contended for the defendants that the executrix is not the

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proprietor. But this is not the proper form of the question, which rather is—is the minor the proprietor? If he is not, the Court of Wards have clearly no right to take it from the plaintiff, in whom as executrix it is vested in law. It is contended further that the position created for the plaintiff by the will is that merely of a manager for the infant proprietor. But however this may be we must look at the grant of probate. Under that grant the plaintiff is the representative of the testator and the estate vests in her as such. But then it is said that, even assuming this to be so, “proprietor” in the Act does not mean a person representatively entitled, but the beneficiary, and that, as the minor is the ultimate beneficiary, the property is his notwithstanding that the estate has admittedly not yet been administered. I cannot however accept this contention. If it were sound the Court of Wards would be entitled to override the wishes of testators and proprietors generally. A person may desire and direct that his estate should vest in and be managed by an executor. The Court of Wards can, it is suggested, at any time override this direction and notwithstanding the grant of probate take the estate out of his hands (notwithstanding moreover that as Court of Wards it has no power of administration); or a trust might be created *inter vivos* for the benefit of an infant and the Court of Wards might according to the argument, come in with or without any pretext and dispossess the trustee. It can never have been intended that the Court of Wards Act was to have power to override private rights in this way. And the language of the Act does not warrant this construction. The residuary legatee does not become “proprietor,” until after the administration has been completed and his interest thus ascertained. This interest is subject to the payment of debts and legacies and the discharge of other trusts contained in the will. No doubt he is beneficially interested in the estate subject to these payments and the discharge of these trusts, but he is not proprietor, except when a residue has been ascertained, which on completion of administration is made over to him by the executrix. It is

admitted that the estate is unadministered. But it is said that the testator died thirteen years ago and there has been mal-administration. If this be so it may be ground for an action for administration on behalf of the minor, but it is no ground for taking possession by the Court of Wards. The argument even goes the length of asserting that the Court of Wards may determine, whether there has been mal-administration and on its own determination take possession of property vested in the executrix. No authority has been cited 'or any of these propositions, which appear to be clearly unsustainable. In my opinion the minor is not the proprietor of the estate so as to enable the Court of Wards to take possession of it. The plaintiff is then entitled to a declaration in terms of clause 3 of the prayer of the plaint and to the injunction sought in clauses 4—6 of the same. The plaintiff is entitled to relief against all the defendants. The documents and evidence show that the defendant Mr. Nathan directed the defendant Mr. Blackwood to assume charge of the Atharhari estate and that the latter by an order directed the first defendant to carry this out, which he has attempted to do. It is not necessary that all the defendants should actually commit the trespass and a trespass committed by order of a higher official is in substance the act of that official, who can be sued as a trespasser.

The rule is therefore made absolute with costs and the suit is decreed in the terms stated as against all the defendants with costs.

Attorneys for the plaintiff : *B. N. Bose & Co.*

Attorney for the defendants : *H. C. Eggar.*

Suit decreed.

Injunction granted.

J. C.

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CRIMINAL REVISION.

Before Mr. Justice Brett and Mr. Justice Ryces.

PHANINDRA NATH MITRA

v.

EMPEROR.*

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July, 14.

Commitment—Right of the accused to cross-examine the prosecution witnesses, and to produce defence evidence before commitment—Power of Magistrate to commit at any stage of the case—Jurisdiction of the High Court, as a Court of Revision, to quash a commitment made to it in its Original Criminal Jurisdiction—Criminal Procedure Code (Act V of 1895), ss. 208, 215 and 347.

Section 347 of the Criminal Procedure Code cannot be read as subject to s. 208, so as to render it imperative on a Magistrate, after he has decided to commit the case to the Sessions, to allow the accused to cross-examine the prosecution witnesses and to call witnesses in his defence.

Where, therefore, the accused did not cross-examine the prosecution witnesses immediately after their examination-in-chief, but applied to the Magistrate, after the close of the prosecution, to cross-examine them and to examine defence witnesses:—

Held, that the Magistrate was justified under s. 347 in committing the case without the cross-examination of the prosecution witnesses and the examination of the witnesses for the defence.

In re Chive Durant (1), followed. *Queen-Empress v. Ahmad* (2), *Emperor v. Muhammad Hadi* (3), dissented from. *Queen-Empress v. Sagal Samba Sajao* (4), distinguished.

Quare:—Whether the High Court, in its Appellate and Revisional Jurisdiction, has power to quash a commitment made to the Court in its Original Criminal Jurisdiction.

CRIMINAL RULE.

The petitioner, who was the printer and publisher of a vernacular newspaper called the "*Jagantar*," was placed before the Chief Presidency Magistrate charged under s. 124A of the Code in respect of certain seditious articles published.

* Criminal Revision No. 788 of 1908
Chief Presidency Magistrate of Calcutta.

(1) (1898) Ratanlal's Unrep. Cr. L.

(2) (1898) I. L. R. 20 All. 264

order of T. 77

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above paper in its issue of the 9th May 1908. It appeared that the petitioner, who was unrepresented, did not cross-examine the prosecution witnesses immediately after their examination-in-chief, but on the 23rd June, when the prosecution had closed its case, a pleader appeared on his behalf and made an application to the Magistrate to be allowed to cross-examine the prosecution witnesses and to call witnesses for the defence.

The Magistrate refused the application and committed the accused to the High Court on the same day.

The third Sessions of the High Court, to which the petitioner stood committed, commenced on the 1st July, and the application to quash the commitment was made on the 8th instant, but before his case was taken up.

Mr. C. R. Dass (Mr. S. N. Haldar and Babu Narendra Kumar Bose with him), for the petitioners. As to the jurisdiction of this Court, the word "High Court" in s. 215 means, according to the definition in s. 4 (j), the highest Court of Criminal Appeal or Revision. In Chapter XXIII, no doubt "High Court" means the Court in its Ordinary Original Criminal Jurisdiction. Section 208 is imperative, and s. 347 is to be read subject to it. An accused has the right of cross-examining the prosecution witnesses before commitment: *Queen-Empress v. Sagal Samba Sajao* (1). The Magistrate has no power to commit, until he has taken all such evidence as the accused may produce before him: *Queen-Empress v. Ahmad* (2), followed in *Emperor v. Muhammad Hadi* (3).

The Standing Counsel (Mr. W. Gregory), instructed by *Mr. Hume*, for the Crown. Section 347 of the Code is not controlled by s. 206. Its terms are imperative. If it appears to the Magistrate at any stage of the proceedings that the case ought to be tried by the High Court, he shall stop further proceedings and commit. Under s. 208 the accused has the right to cross-examine a prosecution witness immediately after his examination-in-chief, but he has no right of cross-examination

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(1) (1893) I. L. R. 21 Cal. 642. (2) (1893) I. L. R. 20 All. 264.

(3) (1903) I. L. R. 26 All. 177.

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at the end of the prosecution case, when the Magistrate has made up his mind that the case must be committed. Refers to *In re Clive Durant* (1).

BRETT AND RYVES JJ. The present application is made to us under s. 215 of the Criminal Procedure Code praying that we will quash the commitment made by the Chief Presidency Magistrate to the High Court of the petitioner, Phanindra Nath Mitra, on a charge under section 124A of the Indian Penal Code. The grounds, on which we are asked to quash the commitment are, that the Presidency Magistrate refused to allow the petitioner to cross-examine the witnesses examined for the prosecution or to cite and examine witnesses in his defence, it being contended that the provisions of s. 208 of the Criminal Procedure Code are imperative, and that the Magistrate was in law bound to allow the petitioner these privileges. It seems that, while the witnesses for the prosecution were being cited and examined, no attempt was made by the accused to cross-examine them, and that the application to cross-examine those witnesses and to cite witnesses for the defence was made to the Presidency Magistrate after the prosecution had closed its case, and the Magistrate had decided to commit the petitioner for trial to the High Court.

The present application is, so far as we are aware, the first of its kind, which has been made to this Court in the exercise of its Ordinary Appellate Jurisdiction, and it seems doubtful to one of us whether, in the exercise of that jurisdiction, we have power to quash a commitment made to this Court for trial under its Ordinary Original Criminal Jurisdiction. The practice in somewhat similar cases has been to apply to the Judge exercising the Original Criminal Jurisdiction of the Court. The question of jurisdiction is one of considerable importance, but as the present application is urgent, we do not propose to deal with it, as we held that the application must fail on the merits.

The question, which is raised by the application, is whether s. 347 of the Criminal Procedure Code is to be read as subject

to the provisions of s. 208 of the Criminal Procedure Code, so as to render it imperative on a Magistrate, after he has decided to commit an accused for trial to the High Court, to allow him to cross-examine the witnesses for the prosecution and to call witnesses in his defence. In our opinion the question must be answered in the negative, and in this view we are supported by a decision of the Judges of the Bombay High Court in the case of *In re Clive Durant* (1). Section 347 distinctly lays down that, when a Magistrate has made up his mind to commit an accused for trial, "he shall stop further proceedings." The section occurs in Chapter XXIV, which lays down the general provisions as to enquiries and trials, and its provisions cannot be held to be governed by the provisions in Chapter XVIII of the Code, which lay down the procedure to be ordinarily followed up to the time when the Magistrate decides to commit.

The attention of the learned Judges of the Allahabad Court, who decided the cases of *Queen-Empress v. Ahmad* (2) and *Emperor v. Muhammad Hadi* (3), to which we have been referred, does not appear to have been invited to the provisions of s. 347 of the Criminal Procedure Code and the case of *Queen-Empress v. Sagal Samba Sajao* (4) is clearly distinguishable from the present, as in that case the point determined was that the depositions of witnesses, whom the accused had not been allowed to cross-examine before the committing Magistrate, were not admissible in evidence in the Sessions Court.

We decline, therefore, to interfere and dismiss the application.

Rule discharged.

E. H. M.

(1) (1898) Ratanlal's Unrep. Cr. Ca. p. 975 (3) (1903) I. L. R. 26 All. 177.

(2) (1898) I. L. R. 20 All. 264.

(4) (1893) I. L. R. 21 Calc. 642.

ORIGINAL CIVIL.

Before Mr. Justice Woodroffe.

KRISTA CHANDRA GHOSE

v.

KRISTA SAKHA GHOSE.*

Receiver—Lease—Summary jurisdiction—Remedy—Interest—Receiver's accounts—Practice.

Where a lease had been already granted by a Receiver acting under an order of Court, and possession of the property had been given to the lessee, and subsequently certain parties applied to the Court for a declaration that the lease was invalid, and for certain other reliefs against the Receiver and the lessee.

Held, that no summary order could be passed to set aside the lease. The proper remedy would be by suit against the Receiver, and also against the lessee, if it was alleged that the lease was obtained by collusion.

Surendro Keshub Roy v. Doorga Soondery Dossee (1), distinguished.

Held further, that on this application no order could be made against the lessee for interest on arrears of rent, nor could any order be passed against the Receiver in respect of the same, as this was a matter touching the Receiver's accounts.

ORIGINAL SUIT.

This was an application by certain of the present parties to an old equity suit for a declaration that the lease of a certain zemindari granted by the Receiver was invalid and for certain other incidental reliefs against the Receiver and the lessee.

The material facts were shortly as follows:—

On August 19th, 1823, Raja Raj Krista died, leaving a will, whereby he appointed Krista Chandra Ghose and Krista Sakha Ghose amongst others his executors. On May 22nd, 1834, this suit was instituted in the old Supreme Court by Krista Chandra Ghose against the defendant executor, the other executors and the heirs of the Raja for the administration and partition of his estate, for the appointment of a Receiver and other incidental relief.

* Ordinary Original Civil Jurisdiction.

(1) (1888) I. L. R. 15 Cal. 253.

By an order dated the 16th September 1836, the Receiver of the Supremo Court was appointed Receiver of the estate, and by a decree passed on the 10th April 1838, the respective shares of the heirs were declared, and a commission of partition was directed to issue.

A large portion of Raja Raj Krista's estate, however, including the zemindari *Gangamandal*, continued to remain unpartitioned, in the hands of the Receiver of the Supremo Court, and on the establishment of the present High Court, in the hands of the Receiver of the latter Court. This suit was, from time to time, revived in the names of the representatives of the parties, who happened to die or relinquish their interest, and the present applicants were brought on the record in the place of their predecessors in title by an order, dated the 12th November 1902.

- On the 5th March 1902, an order was passed giving the Receiver liberty "from time to time, without further order of the Court, to lease the said estate, for a term not exceeding six years, on such terms as to such Receiver may seem reasonable."

Under the last mentioned order the Receiver granted a lease of the zemindari of *Gangamandal* to Raja Beney Krista, one of the parties to the suit, at a yearly rental of Rs. 64,500 for a term of six years expiring on the 11th April 1908. In November 1907 the petitioners offered to take from the Receiver a lease of the zemindari, on the expiry of the current lease, at an enhanced rent. On the 7th January 1908, that is, before the termination of the current lease, the Receiver, without notice to the other parties to this suit, granted a lease of *Gangamandal*, for a further term of 6 years as from the 11th April 1908, at the same yearly rental of Rs. 64,500 to the same lessee. On the 11th February 1908, the petitioners made an offer to the Receiver to take a lease of the Zemindari for 6 years at an increase of Rs. 10,000 over the present yearly rent, and on the 6th March 1908, the Receiver informed the petitioners that he was not in a position to accept their offer. On new discovering for the first time the lease granted on the 7th January 1908, the petitioners made the present application, further charging the Receiver with having failed

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to enforce the terms of the previous lease against Raja Benoy Krista, in not realizing from him the interest payable by him on arrears of rent.

This application, which was on notice to the parties, was for a two-fold order :—

(i) That the case of the 8th January 1908 granted by the Receiver to Raja Benoy Krista be held to be invalid as against the applicants and that a lease of *Gangamandal* be granted after due advertisement so as to secure a larger rental in the interests of the estate ; and

(ii) That the Receiver be directed to realise all sums due for interest from the said lessee Raja Benoy Krista or he do personally make good the losses sustained by the estate in that behalf.

The first part of the application was heard on June 8th, 1908.

Mr. A. Chaudhuri for the petitioners, and *Mr. Chakravarti* for some of the parties, in support of the petition, applied for an adjournment to file further affidavits.

The Advocate-General (Mr. Sinha) (*Mr. Stokes* with him) for the lessee, *Rajah Benoy Krista*, took the preliminary objection that the application could not be entertained. The lease was executed on January 8th and possession was taken. The matter had passed out of the stage of a contract and had resulted in a conveyance of the property to the lessee. The Court had no power to pass any summary order on this application, declaring the lease invalid. The petitioners' remedy lay in instituting a separate suit.

Mr. Chakravarti. Parties are always allowed to appear *pro interesse suo*. The lessee was a party to this suit, and all the parties were before the Court. The Court can always control the management of an estate by the Receiver. See *Surendro Keshub Roy v. Doorga Soondary Doss*, (1). The jurisdiction extends beyond the region of contract.

Mr. A. Chaudhuri. The act complained of was an act of the Receiver. The lessee being a party to the suit, could

always be brought before the Court : See Woodroffe on Receivers, pp. 220, 221.

Mr. C. R. Das, for some of the parties, supported the Advocate-General and cited *Ghosal v. Ghosal* (1) decided by Salo J. in favour of his contention.

The Advocate-General, in reply. Both the cases *Surendro Keshub Roy v. Doorga Soondary Dossee* (2) and *Carne v. Branker* (3) cited therein, dealt with matters of contract, and are to be distinguished from the present application, where the lessee has rights *in rem*. Similarly with the case of *De Winton v. The Mayor of Brecon* (4), where the Receiver parted with money without the sanction of the Court. In the present matter the Receiver had the Court's sanction, and the only question is, whether he exercised his discretion properly.

Mr. B. C. Mitter appeared for the Receiver, and Mr. H. D. Bose, and Mr. Rasul for other parties.

WOODROFFE J. The Advocate-General appears on behalf of the lessee Rajah Benoy Krista Deb, to whom the Receiver has leased the property, the subject of this application, and takes a preliminary objection that this application cannot be entertained and that the lease having been already executed, no summary order can be passed such as is asked for here. On the other hand, reliance is placed upon cases, in which the parties were allowed to appear *pro interesse suo*; but these cases do not apply, because there the question arose on the application of third parties aggrieved by the Court's action through its Receiver, and the Court grants such an application by reason of the control it necessarily has over its Receiver's action. This is not a case of that kind. I am not asked in this matter to control the action of the Receiver, because the Receiver has already done that which is complained of and has conveyed the property into the hands of the lessee, a third party, to whom the Receiver, under the order giving him authority to do so, granted a lease, which has been completed and under which possession has been given.

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(1) Unreported.

(2) (1888) I. L. R. 15 Calc. 253.

(3) (1869) 17 W. R. 342, 837.

(4) (1860) 20 Beav. 200.

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J.

Admittedly, in this case, the lessee is also a party to the suit; but though he is subject to the jurisdiction of the Court as a party, he is not subject to its jurisdiction as lessee. This is not a case in which the matter rests on an agreement, which has not been carried out, and in which the Court may interfere to prevent its Receiver giving effect to the proposed agreement. This is a case, in which the matter has passed out of the stage of agreement, and has resulted in a conveyance of the property to the lessee. As long as that lease stands, the property must be taken to be in the lessee, and I do not think that I can, on this application, set aside that lease.

The course open to the applicant appears to me to be by proceeding by suit against the Receiver, and also, if it is alleged that the lease was granted and obtained by collusion, against the lessee. In the case cited, *Surendro Keshub Roy v. Durgasoodery Dossee* (1) the Court was asked to control the action of the Receiver and to enforce the applicant's right to have a lease, for which a contract had been entered into; and in the English cases therein cited, the matter still rested on contract and an order was made directing enquiry as to damages against the lessee, who had repudiated the contract, and in the other case, the Receiver had parted with money without the authority of the Court and so the Court's money was ordered to be paid back. But here, unless the lease is set aside, the interest is not that of the Court, or of the parties, but of the lessee.

Under these circumstances, the application appears to me to be not entertainable and must be dismissed.

I need only add had the preliminary point not prevailed, I should have been disposed to grant the adjournment asked for by Mr. Chaudhuri and by Mr. Chakravarti in order to put in further affidavits.

Application dismissed.

THE second part of the application was heard on June 22nd, 1908.

WOODROFFE J. This is a part of an application, which I dealt with on the 8th June 1908. On that date, I dealt with the question then raised, as to whether the lease granted by the Receiver to Raja Benoy Krista Deb Bahadur should not be set aside, which I then decided in the negative. Another part of the application asks that the Receiver may be directed to realise all sums due for interest from the lessee or he may personally make good the losses sustained by the estate. As regards this application, a distinction must be drawn between the present and the late lease. As regards the present lease, it is clear, if the parties insist on it or any of them, that the terms of the lease must be strictly enforced, and, if the rent is in arrears, the lessee must pay interest; but on the other hand, the lessee is not bound to pay anything under the lease before it is due. Then the question arises, as to the late lease, whether an order can be made as to the interest on the arrears of rent, which it is said amounts to a large sum of money, nearly Rs. 9,000, and which should, it is said, have been recovered by the Receiver from the lessee. There appears to me to be two objections to this part of the application. No order can be made against the lessee on the present application. If it can, it is said, the lessee holds a discharge from the Receiver for all the rent under the late lease. However that may be, it is sufficient to say, no order can be made against the Rajah on this application. Then, if the applicant has any remedy against the Receiver in respect of these moneys, the matter cannot be gone into on this application. It is a matter touching the Receiver's accounts. In so far as the Receiver's accounts have been passed, the matter may be taken to be concluded. So far as the accounts have not been passed, it is open to the parties to raise the question on the passing of the accounts. The answer of the Receiver as to the payment of interest on arrears of rent not being insisted on is given in the 4th paragraph of his affidavit sworn on the 11th June 1908, in which he states that the parties agreed to waive interest on arrears of rent, because the lessees agreed to pay a monthly allowance of Rs. 3,000 in advance and Rs. 3,000 before the closing of the Court offices for the *pujahs*.

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and this agreement was in consideration of the interest in respect of each instalment of rent not being insisted upon. As I have said, I desire to express no opinion on the merits of these contentions, because, in so far as they are against the lessee, they cannot be gone into in these proceedings; and as against the Receiver, they must be raised (if at all) on the passing of the Receiver's accounts and the Court can then determine, whether the matter can then be gone into or whether it is one, as to which the parties must file a suit against the Receiver. I express no opinion on the merits. The result is the application is dismissed with costs.

Application dismissed.

Attorney for the petitioner : *C. C. Bose.*

Attorneys for Raja Benoy Krista Deb : *Morgan & Co.*

Attorneys for other parties : *S. K. Deb, Leslie & Hinds,*

Watkins & Co., B. A. Bose & Co., C. C. Mitter, A. N. Ghose.

J. C.

ORIGINAL CIVIL.

Before Mr. Justice Stephen.

EBRAHIM ISMAIL TIMOL

PROVAS CHANDER MITTER.*

1908
Aug. 5*Jurisdiction—Suit for land—Suit by lessee for rents and profits during absence
—Lessor in possession—Letters Patent, 1863, cl. 12.*

A, a lessee of certain premises outside the jurisdiction of the Court, having vacated the premises on account of being sentenced to a term of imprisonment, on his release brought a suit against the lessor, who had in the meantime taken over possession, claiming the rents and profits arising therefrom pending the termination of the lease, and further claiming that the lessor during his absence became trustee for him.

At the hearing the lessor contended there was no cause of action as this was a suit for land.

Held, that, inasmuch as the lessee was seeking to obtain possession of the premises by claiming the rents and profits from the lessor, he sought to do something, which directly affected the property, and therefore this was a suit for land outside the jurisdiction of the Court and must be dismissed.

Delhi and London Bank v. Woodie (1), *Kellie v. Fraser*, (2) and *Hara Lal Bannerjee v. Nitambini Debi* (3) followed. *Rungo Lal Lohea v. John Wilson* (4) distinguished.

ORIGINAL SUIT.

THIS was a suit brought by the plaintiff, Ebrahim Ismail Timol, for an account to be taken by the High Court of certain sums of money due to him by the defendant, Provas Chandra Mitter, under a lease, and for damages resulting from the wrongful removal of certain stables; and further that the lease and the rights of the plaintiff as lessee be declared valid and subsisting, and that the plaintiff be entitled to receive the rents and profits of the premises pending the termination of the lease, or that in the alternative the defendant do pay

* Original Civil Suit No. 462 of 1908.

(1) (1876) I. L. R. 1 Calc. 249.

(3) (1901) I. L. R. 29 Calc. 315.

(2) (1877) I. L. R. 2 Calc. 445.

(4) (1898) I. L. R. 26 Calc. 204;

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to the plaintiff the sum of Rs. 1,500 with interest at 4 per cent. per annum.

The facts were shortly as follows :—

By an Indenture of lease, dated the 2nd November 1905, and made in Calcutta between the defendant as lessor and the plaintiff as lessee in consideration of a monthly rent of Rs. 220, the defendant demised and leased to the plaintiff a dwelling house and premises No. 38, Elgin Road, in the town of Calcutta for a term of 15 years from the 15th September 1905 until the 30th September 1920, subject to certain covenants contained in the lease, of which one provided, that the plaintiff should deposit with the defendant the sum of Rs. 1,500 to carry interest at 4 per cent. per annum as security for the due payment of the rent reserved. Thereafter the plaintiff paid to the defendant the sum of Rs. 1,500 by way of security and took possession of the premises about the 15th September 1905. He paid the defendant the rent reserved by the lease until the month of May 1906, having previous to that date erected upon the premises certain tiled stables at a cost of Rs. 3,500. The plaintiff in his plaint stated that on the 12th August 1906 he received from the defendant a letter demanding payment of the rent due for the said premises for the month of July 1906, and as he was himself unable to attend to business he immediately handed the letter to his uncle, D. L. Barmanie, and instructed him to look after the matter, but he found on entering the premises on the 16th August 1906, that the defendant had leased it to a third party at a rental of Rs. 400, and had removed the stables erected by the plaintiff and sold the materials used in erecting the stables.

The plaintiff also pleaded leave to institute his suit under clause 12 of the Charter.

The defendant in his written statement denied that the plaintiff paid rent up to May 1906, and alleged that he only paid rent up to March of that year long after it became due.

Thereafter, being unable to realize rent from the plaintiff, the defendant brought a suit in the Small Cause Court of Sealdah in July 1906 for the recovery of rent due for April,

May and June 1906, and obtained a decree on the first of August 1906. The plaintiff after institution of the Small Cause Court suit paid up Rs. 220 and the defendant has given him credit for that amount. The defendant then took out execution against the plaintiff and found the premises abandoned by the plaintiff and all furniture removed. At about this time the defendant heard that the plaintiff was convicted of criminal breach of trust and sentenced to a long term of imprisonment, and he also found that the water pipes had disappeared from the premises, and that the electric fittings had been damaged. After taking possession of the premises the defendant found that the plaintiff had erected tiled huts on the tennis Court without his consent, and contrary to the terms of the lease. The huts were of small value, and the defendant submitted that they became his property absolutely under the provisions of the Transfer of Property Act.

The defendant denied the statement that he relet the premises Rs. 400, but alleged that he gave a fresh lease of the premises to a Mr. Goodwin for a term of 3 years and 5 months at a monthly rent of Rs. 205. Subsequently the defendant removed the tiled huts and sold them for Rs. 70, the best available price at the time. The defendant submitted that, inasmuch as the plaintiff allowed the rent to fall in arrear over 21 days, the lease thereby terminated and was no longer subsisting. The defendant further submitted that on the alternative claim of Rs. 1,500 with interest, the following was a summary of what was due to him by the plaintiff. *a.* Amount due on decree in the Small Cause Court with interest at 6 per cent.—Rs. 516-5-9. *b.* Arrears of rent for the month of July, 1906, Rs. 220. *c.* The sum of Rs. 220 being damages sustained by the defendant for the premises remaining vacant during August 1906. *d.* The sum of Rs. 896-7-9, the sum which the defendant had to spend to repair the premises on account of the plaintiff's abandonment of the premises. *e.* The sum of Rs. 660, which the defendant had to pay for brokerage, when the premises were let out to the plaintiff.

The defendant stated that he was entitled to a set off of the items above mentioned amounting to Rs. 2,597-15 against the

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sum of Rs. 1,500 with interest at 4 per cent. and submitted that there should be a decree in his favour for the difference.

Mr. Pugh and Mr. Stokes for the plaintiff. This is not a suit for land, but for money only. *Runga Lal Lohea v. John Wilson* (1), *Kellie v. Fraser* (2), *Delhi and London Bank v. Wordie* (3), *Hara Lal Bannerjee v. Nitambini Debi* (4), referred to. I shall be satisfied with a personal order against the defendant. The mere fact that the suit is about land is not the test, the real question being, is it a suit for dispossession of land? *Land Mortgage Bank v. Sudurudeen Ahmed* (5). The defendant never received the money for rent at the house of the plaintiff, but always in Calcutta. The only case against me is *Hara Lal Bannerjee v. Nitambini Debi* (4), where Harington J. held that a suit for administration was a suit for land.

The Advocate-General (Hon'ble Mr. S. P. Sinha) (with him, *Mr. Chakravarty and Mr. S. R. Dass*) for the defendant. I admit that a suit for rent is not a suit for land, but this is not a suit for land. The prayer in the plaint shows that he is seeking to obtain such title as he can have to the land. The suit is not merely for a declaration, but is a suit to obtain control and possession of the house itself. The plaintiff under his plaint claims that, inasmuch as the defendant took over possession of the house, he is a trustee for the plaintiff, and that he is to receive the rents and profits for the plaintiff. He does not claim the surplus rents and profits, but claims to be entitled to the rents and profits. *Runga Lal Lohea v. John Wilson* (1) distinguished. See Foa's Landlord and Tenant, page 397. This case is similar to *Delhi and London Bank v. Wordie* (3). The words in clause 12 of the Charter mean the same thing as section 16 (a) (b) (c) (d) (e) and (f) of the Code. *Nalun Lakshimikantham v. Krishnaswamy Mudaliar* (6) referred to, Section 16 of the Code shows what really is a suit for land *Kellie v.*

(1) (1898) I. L. R. 26 Calc. 204;

2 C. W. N. 718.

(2) (1877) I. L. R. 2 Calc. 445.

(3) (1876) I. L. R. 1 Calc. 249.

(4) (1901) I. L. R. 29 Calc. 315.

(5) (1892) I. L. R. 19 Calc. 358, 360.

362.

(6) (1903) I. L. R. 27 Mad. 157.

Frascr (2). The nature of the suit is really to recover possession and comes clearly within clause 12 of the Charter.

STEPHEN J. In this case the plaintiff claims certain reliefs under the following circumstances :—

On the 2nd of November 1905 he took from the defendant a lease of a house and premises 38, Elgin Road, which are admittedly beyond the limits of the local Original Jurisdiction of this Court. The lease was for 15 years from the 15th of September 1905. It contained two provisions with which we are concerned; the first was an ordinary covenant for re-entry by the landlord in case of non-payment of rent, the other provision gave him a right to enter on the premises on their being vacated by the tenant, and enabled him in that case to relet the premises, the tenant remaining liable on his covenants, and in particular being liable for any deficiency of the rent on re-letting by the landlord. What occurred was that the rent for the months of April, May and June fell into arrears, and the landlord obtained a decree in respect of these arrears in the Small Cause Court in August of that year. At about the same time the premises were vacated by the defendant on his being committed to jail in consequence of a conviction before the criminal sessions of this Court. The plaintiff's chief contention is that the defendant entered on the premises under the second of the covenants that I have mentioned, and that the lease has not been terminated, but the defendant is a trustee for his benefit in respect of the profits that he has received in respect of these premises and must account to him for any rent he has obtained from the premises exceeding the amount which the plaintiff has undertaken to pay. He also claims damages for stables, which he says the defendant has pulled down, and alternatively, if the lease is terminated, a return of Rs. 1,500, which he deposited with the defendant as security for rent.

On these facts the defendant has taken a preliminary objection that this is a suit for land or immoveable property outside the local limits of the jurisdiction of this Court, and can-

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not therefore be tried by this Court under the powers conferred by clause 12 of the Letters Patent. To decide this question I must in the first place look to the prayers of the plaint to see what exactly are the reliefs claimed. Of these I need consider only the first four. By the first and second the plaintiff asks for an account of money due to him under the lease, by the third for a declaration that the lease and the rights of the lessee are valid and subsisting, and by the fourth for a declaration that he is entitled to the rents and profits of the premises pending the termination of the lease.

The subject matter of the first and second of these is money in the hands of the defendant as trustee for the plaintiff and is based on events that have occurred. The subject matter of the third and fourth must apparently be the premises in question and the rents and profits arising therefrom. The granting of the third and fourth prayers will enable the plaintiff to recover rents from any tenant of the house, and will thus put the plaintiff into possession of the house by receipt of its rent. The law applicable to the case may be gathered from several decisions in this Court. In the first place a comparison may usefully be made between the two cases of the *Delhi and London Bank v. Wordie* (1) and *Kellie v. Fraser* (2). The first of these was a suit to have certain trusts carried into effect, and its express purpose is stated by Garth C. J. to be to compel the sale of certain land not within the local jurisdiction of the Court. It was held that the case depended on whether the suit was "brought substantially for land, that is for the purpose of acquiring title to, or control over, land" within the meaning of clause 12: and on the facts it was decided that it was and that the Court had no jurisdiction.

The second case, which is one of two chiefly relied on by the plaintiff, was an application to file an award, by which a dissolution of a partnership was awarded, and it was ordered that a tea garden at Darjeeling, the property of the partners, should be sold. It was held a suit to effect what was ordered by the award could not have been a suit for land, because

(1) (1876) L. L. R. 1 Calc. 249.

(2) (1877) L. L. R. 2 Calc. 445.

the object of the suit would have been to enforce a dissolution of the partnership on suitable terms and not to obtain possession of or acquire a title to the tea garden; and that the application was therefore within the jurisdiction of the Court. The case of *Runge Lall Lohea v. Wilson* (1) is also relied on by the plaintiff. There the suit was for rent of premises in Howrah. The defendant did not deny that they were tenants of the premises, and were liable to pay rent for them. What was disputed was the terms of the tenancy and the right of the plaintiffs in respect of it. No relief was asked for in respect of the land, and it was not sought to deal with it in any way. It was accordingly held that this was not a suit for land under clause 12. In *Hara Lall Bannerjee v. Nitambini Debi* (2) the plaintiff sued for construction of a Will, for administration of the property demised, and for the immediate possession of immoveable property at Hooghly. Following the decisions in *Delhi and London Bank v. Wordie* (3) and *Kellie v. Fraser* (4), it was held that the suit was for land. The facts of this case seem to me to show that as far at least as the third and fourth prayers are concerned the suit is one for land. This appears to me certainly so in view of the case of the *Delhi and London Bank v. Wordie* (3), and I see no reason at all for not following that ruling in consequence of anything that is found in the decision in *Kellie v. Fraser* (4). Indeed the difference between these two cases seems to me to show that this is certainly a suit for land. I was at first struck with the case of *Runge Lall Lohea v. Wilson* (5), but on looking into the facts of that case I think that it is abundantly clear that it is entirely different from the present one. What the plaintiff is seeking to do is to do something, which will directly affect the property, namely, to obtain possession of it by receipt of rent. Under these circumstances I hold that this is a suit for land outside the jurisdiction of this Court and consequently that it cannot be brought as far as prayers 3 and 4 are concerned.

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(1) (1898) I. L. R. 26 Calc. 201; 2 C. W. N. 718

(2) (1901) I. L. R. 29 Calc. 315

(4) (1877) I. L. R. 2 Calc. 445

(3) (1876) I. L. R. 1 Calc. 249.

(5) (1898) I. L. R. 26 Calc. 204;

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It then remains to be considered whether I can entertain the prayer for an account by the defendant, and the prayer for damages in respect of the pulling down of the stables referred to by the plaintiff. It seems to me clear that I cannot entertain either of these two prayers. The plaintiff alleges that his lease is still in existence and neither of the questions that I have referred to can be determined till this point is decided.

The plaintiff alleges that the defendant is for some purposes his trustee. This again depends entirely upon what has taken place under the lease. The result is that this suit must be dismissed with costs. I have to add that the defendant at an early stage of the case made an offer that, if the plaintiff would admit that the lease was terminated, the question of the defendant's liability to account for Rs. 1,500, which he has received, should be decided.

This offer was not accepted by the plaintiff.

Attorney for the plaintiff : *Fox and Mandal.*

Attorney for the defendant : *Manuel and Agarwalla.*

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CRIMINAL REVISION.

Before Mr. Justice Brett and Mr. Justice Ryves.

FANINDRA NATH CHATTERJEE

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Summary trial—Jurisdiction—Facts determining jurisdiction to try summarily—Criminal Procedure Code (Act V of 1898) s. 260—Distrain, legality of—Form of the distress warrant—Bengal Municipal Act (Bengal Act III of 1884), s. 122.

It is not the complaint alone, which determines the jurisdiction of the Magistrate to try a case summarily, but the complaint and the subsequent examination of the complainant taken together.

Where it appeared from the complaint and the sworn examination of the complainant that the facts amounted to an offence under s. 186 of the Penal Code :—

Held, that the Magistrate had jurisdiction to try the case summarily.

Bishu Shaik v. Saib Mollah (1) referred to.

Where the distress warrant authorized the distrain of the moveables of the defaulters, wherever found within the Municipality, or any other moveables found within the holding specified, it was *held* that the tax daroga was justified in attaching goods proved to belong to the defaulters, which were found within the municipal limits.

CRIMINAL REFERENCE.

ON the 25th March 1905 a complaint was lodged by one Binda Charan, tax-daroga of the Durbhunga Municipality, before the Deputy Magistrate in charge at Durbhunga, "that on the day previous he had gone to realize municipal taxes due from one Haridasi and Baroda Kanta Chatterjee, who had a shop under the fictitious name of *Minto Brothers* within the jurisdiction of the Durbhunga Municipality; that he ordered a peon to attach ten tins of red powder from the shop in the presence of one Fanindra Nath Chatterjee, but the latter ordered his servant to obstruct the attachment and not to allow the properties to be removed from the shop, and further

* Criminal Reference No. 145 of 1903, by H. E. Ransom, Sessions Judge of Durbhunga, dated the 9th July 1903.

(1) (1902) I. L. R. 29 Calc. 409.

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criminally intimidated him and his men, and that Fanindra and his servant having showed force, he sent for the head-constable to help him in making the distraint, but that both the accused resisted his legal action."

The complainant applied for summonses under s. 186 and s. 504 of the Penal Code.

He was examined on oath and stated as follows :—

" I went with a warrant yesterday to realize the municipal tax from Haridasi and Baroda, who have recently opened a shop under the name of *Minto Brothers*. I went to the shop. My peon attached ten tins of red powder. A boy, named Fanindra, ordered his peon to take away the attached tins, and the latter then seized them from my peon. I sent for the head-constable to help me as provided by law. In his presence also the boy intimidated me, and said he would not allow the attached property to be taken away."

The Magistrate issued warrants under ss. 186 and 504 of the Penal Code, but tried the case summarily, and convicted the accused under section 186, and sentenced them to fines.

In his subsequent examination during the trial the complainant omitted all reference to the criminal intimidation, and only alleged that the property attached had been re-taken from his peon at the order of the petitioner, Fanindra, who angrily refused to allow it to be distrained.

The distress warrant purported to be against the firm of *Haridasi Baroda Kant Chatterjee* and was in the terms set forth in the judgment of the High Court.

Upon motion to the Sessions Judge of Durbhunga by the accused, he referred the case, under s. 438 of the Criminal Procedure Code, to the High Court, recommending the reversal of the convictions and sentences.

The material portions of the Letter of Reference were as follows :—

I do not think the Deputy Magistrate's order can be sustained. In addition to his (complainant's) statement in the petition of complaint that he had been criminally intimidated, the tax-daroga in his examination by the Deputy Magistrate also said he had been intimidated, which must, I think, be taken to mean criminally intimidated by the petitioners. At the subsequent trial no doubt he omitted all reference to any such offence and merely spoke of the distraint having been angrily resisted. The jurisdiction of the Court would appear however to be determined, as a matter of principle, by the petition of complaint, unless possibly there may be anything in the examination of a complainant to show that the offence stated in the petition was not committed.

The ruling in *Bishu Shaik v. Saber Mollah* (1) is an authority in support of this view. I lay stress upon this, as in a very recent reference, *Emperor v. Ram Narain Jha*, where the examination of the complainant had not been properly recorded and where I did not quote this ruling, a Divisional Bench of the Hon'ble Court followed the complainant's sworn statement as determining the jurisdiction, in preference to the petition of complaint itself, which recited an offence, which was not triable summarily. A municipal tax-daroga is a public servant, and the offence complained of fell properly under section 189 of the Indian Penal Code, which is not triable summarily. It appears to me that the Deputy Magistrate acted without jurisdiction in holding a summary trial. There is also in my opinion another serious defect in the proceedings. The tax-daroga professed to act under a warrant issued under section 122 of the Bengal Municipal Act (III of 1884). This warrant authorised him to distrain the moveable property of *Haridas Baroda Kant Chatterjee*. In his evidence at the trial, he states that this was the name of a shop, which he was informed was owned by the petitioners and others, that the shop was closed, and that he proceeded to another shop opened in the name of *Minto Brothers*, which he was informed was owned by the owners of the shop of *Haridas Baroda Kant Chatterjee*, and that there he attached ten tins of red powder which the first petitioner caused to be forcibly taken away by the second petitioner. It appears to me that in levying the distraint in the shop of *Minto Brothers*, the daroga exceeded his authority under the warrant. It appears to me immaterial whether, as the Magistrate finds (though this finding is based on no evidence but the mere hearsay statement of the daroga) the owners of the two shops are the same person. The warrant authorised the attachment of the property of *Haridas Baroda Kant Chatterjee* relating to a particular holding, 11771, and could not, therefore, be executed upon goods forming the ostensible property of other owners. If, therefore, the offence fell merely under section 186 of the Indian Penal Code the petitioners would appear to be justified in resisting the attachment as the daroga was not acting in the discharge of his public functions. The actual resistance complained of cannot, I think, under such circumstances, be regarded as an excess of the petitioner's right of private defence. I recommend that the Magistrate's order be set aside, and the fines, if paid, be refunded.

Ba'n Dwarka Nath Mitra in support of the reference. The complaint determines the procedure to be adopted, viz., whether it is to be regular or summary. See *Bishu Shaik v. Saber Mollah* (1) and *Ram Chunder Chatterjee v. Kanye Laha* (2). I generally adopt the reasoning of the learned Sessions Judge in his Letter of Reference.

Mr. Orr (Deputy Legal Remembrancer) for the Crown. The whole of the evidence in this case shows that the offence committed was one under s. 186 of the Penal Code, and the

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Magistrato had, therefore, jurisdiction to try the case summarily. The ruling in *Bishu Shaik v. Saber Mollah* (1) is distinguishable. The facts of that case were quite different. The distress warrant justified the tax-daroga in seizing any movable property of the defaulters within the limits of the Municipality, and the Magistrato found that the property attached belonged to the defaulters and were within such limits.

BRETT AND RYVES JJ. This is a reference by the learned Sessions Judge of Durbhunga forwarding the case of Fanindra Nath Chatterjee and Chandoo Khan, who were convicted by a Deputy Magistrato under section 186 of the Indian Penal Code and sentenced to pay a fine of Rs. 50 and Rs. 20 respectively, with a recommendation that the convictions and sentences should be set aside.

Two grounds have been suggested for the interference of this Court. First, that the Magistrato had no jurisdiction to try the case summarily, inasmuch as the complaint filed by the complainant discloses an offence punishable under section 189 of the Indian Penal Code, which is not triable summarily, and secondly, that the warrant of distraint made over to the complainant authorised him to distrain the properties of the defaulters named therein found in certain premises described in the warrant. It has been found that the goods, which had been placed in the premises named in the warrant, had a short time previously been removed to another shop, which was fictitiously opened under the style of *Minto Brothers*, but which was really in the same ownership as the old shop.

It is contended that the tax-daroga under this warrant had no right to seize the properties in the shop owned by the *Minto Brothers*.

On the first point the learned Sessions Judge relies on the case of *Bishu Shaik v. Saber Mollah* (1) as an authority for showing that the jurisdiction of a Magistrato to try a case summarily depends on the wording of the complaint. That case, however, does not lay down any such proposition. It

was there held that "on the facts before the Magistrate the offence complained of were not triable summarily. The petition of complaint discloses the commission of a much more serious offence than the offence for which the Magistrate has held a summary trial. The examination of the complainant, which has not been properly recorded, does not show that the offence so complained of was not committed." It is clear in this case both from the complaint and from the sworn statement of the complainant that the facts stated do not amount to anything more than an offence, which is covered by section 186 of the Indian Penal Code. We, therefore, think that the Deputy Magistrate had jurisdiction to try the case summarily.

On the second point also we are unable to agree with the learned Sessions Judge. The form of the warrant authorised the tax-daroga "to distrain the moveable properties of the said defaulters, wherever they may be found within the Municipality, or any other moveable properties, which may be found within the holding specified in the margin to the amount of the said sum." Once it is established by evidence that the goods, which were sought to be distrained, belonged in fact to the defaulters and were within the limits of the Municipality, the tax-daroga had complete jurisdiction to distrain them under this warrant for the amount specified therein.

For these reasons we decline to interfere, and direct the records to be sent down.

E. H. M.

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CRIMINAL REVISION.

Before Mr. Justice Brett and Mr. Justice Ryves.

KANCHAN GORHI

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1908

August 11.

Complaint—Magistrate—Complaint to Magistrate in charge of the sadar—Reference of complaint to another Magistrate for inquiry and report—Jurisdiction of latter to direct prosecution of the complainant before dismissal of the complaint—"Judicial proceedings"—Criminal Procedure Code (Act V of 1908) ss. 4 (m) and 476.

Where a complaint was lodged before the Senior Deputy Magistrate in charge of the *sadar*, who referred it to a Junior Deputy Magistrate "for inquiry and report", and the latter, after taking evidence, drew up a proceeding under s. 476 against the complainant, and submitted a report to the former Magistrate, upon which he dismissed the complaint the next day:—

Held, that the proceeding before the Junior Deputy Magistrate was a "judicial proceeding" within s. 4(m), and that he had jurisdiction under s. 476 of the Criminal Procedure Code to direct the prosecution of the complainant for an offence under s. 211 of the Penal Code committed before him.

CRIMINAL RULE.

ON the 1st June 1908 the petitioner lodged a complaint before Bahu S. K. Mukerjee, the Deputy Magistrate in charge of the *sadar* Purnea, against one Ram Krishna Mundul and others, alleging that they went to his house on the 28th May 1908 and extorted Rs. 50 from him. It appeared from the order-sheet of Babu S. K. Mukerjee that on the 17th June he referred the case to Mr. E. A. Oakley, a Deputy Magistrate, "for inquiry and report," and the latter in his Explanation to the High Court admitted that the case had been sent to him for that purpose.

On the 2nd July Mr. Oakley examined the petitioner and some of his witnesses, and having disbelieved the prosecution story, drew up a proceeding on the 9th instant, under s. 476 of the Criminal Procedure Code, against the petitioner, and

* Criminal Revision No. 845 of 1908 against the order of F. S. Hamilton, Sessions Judge of Purnea, dated the 15th July 1908.

put him on bail to appear, when called upon. On the same day he drew up a report and forwarded it to Babu S. K. Mukerjee with the order under s. 476. On receipt of the report the latter, on the next day, dismissed the complaint under s. 203 of the Code in the absence of the petitioner and without recording any reasons for his order as required by the section.

The petitioner thereafter moved the Sessions Judge of Purnea, who refused to interfere. He then obtained the present Rule from the High Court on the ground that after the Deputy Magistrate, Babu S. K. Mukerjee, had transferred the case to Mr. Oakley for "inquiry and report" only, and the latter did not take up the case for trial, but merely for the purpose of making a report, he had no jurisdiction to pass an order under s. 476 of the Code, until the case was legally disposed of by Babu S. K. Mukerjee.

Mr. Orr (Deputy Legal Remembrancer), for the Crown. The order of transfer to Mr. Oakley was not illegal. The senior Deputy Magistrate had power under s. 192 of the Code to refer the case to Mr. Oakley. The proceeding before the latter was a "judicial proceeding" under s. 4 (m), as he had the power to examine, and did examine, witnesses on oath. Then under s. 476 he had jurisdiction to direct the prosecution of the complainant as the offence under s. 211 of the Penal Code was committed before him.

Babu Dasrathi Sanial (Babu Aban Bhusan Mukerjee with him), for the petitioner. The case of the accused was sent to Mr. Oakley obviously under s. 202 of the Code "for inquiry and report." An investigation under this section is not a "judicial proceeding." Again Mr. Oakley had no jurisdiction to act under s. 476 as the case was forwarded to him only for inquiry and report and not for trial. Further he had no power to direct the prosecution of the petitioner, until the complaint had been dismissed by the senior Deputy Magistrate. *Jogendra Nath Mookerjee v. Emperor* (1) and *Queen-Empress v. Sham Lal* (2).

CRIMINAL REVISION.

Before Mr. Justice Brett and Mr. Justice Ryves.

KANCHAN GORHI

v.

RAM KISHUN MUNDUL.*

1908

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Held, that the proceeding before the Junior Deputy Magistrate was a "judicial proceeding" within s. 4(m), and that he had jurisdiction under s. 476 of the Criminal Procedure Code to direct the prosecution of the complainant for an offence under s. 211 of the Penal Code committed before him.

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The petitioner thereafter moved the Sessions Judge of Purnea, who refused to interfere. He then obtained the present Rule from the High Court on the ground that after the Deputy Magistrate, Bahu S. K. Mukerjee, had transferred the case to Mr. Oakley for "inquiry and report" only, and the latter did not take up the case for trial, but merely for the purpose of making a report, he had no jurisdiction to pass an order under s. 476 of the Code, until the case was legally disposed of by Bahu S. K. Mukerjee.

Mr. Orr (Deputy Legal Remembrancer), for the Crown. The order of transfer to Mr. Oakley was not illegal. The senior Deputy Magistrate had power under s. 192 of the Code to refer the case to Mr. Oakley. The proceeding before the latter was a "judicial proceeding" under s. 4 (m), as he had the power to examine, and did examine, witnesses on oath. Then under s. 476 he had jurisdiction to direct the prosecution of the complainant as the offence under s. 211 of the Penal Code was committed before him.

Babu Dasarathi Sanial (Babu Aban Bhusan Mukerjee with him), for the petitioner. The case of the accused was sent to Mr. Oakley obviously under s. 202 of the Code "for inquiry and report." An investigation under this section is not a "judicial proceeding." Again Mr. Oakley had no jurisdiction to act under s. 476 as the case was forwarded to him only for inquiry and report and not for trial. Further he had no power to direct the prosecution of the petitioner, until the complaint had been dismissed by the senior Deputy Magistrate. *Jogendra Nath Mookerjee v Emperor* (1) and *Queen-Empress v. Sham Lal* (2)

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DRETT AND RYVES JJ. It appears that the case, out of which this Rule arises, was sent by Babu S. K. Mukerjee, who had taken cognizance of it, to another Deputy Magistrate, Mr. Oakley, for inquiry prior to the issue of process against the accused. Mr. Oakley made the inquiry, examined witnesses, and came to the conclusion that the case, as presented by the complainant, was false and, therefore, he took proceedings under section 476 of the Criminal Procedure Code, and committed the complainant for trial under section 211 of the Indian Penal Code.

The present Rule was obtained on the District Magistrate to show cause why the proceedings drawn by Mr. Oakley under section 476 of the Criminal Procedure Code should not be set aside on the ground that, after the case had been transferred to Mr. Oakley by the Deputy Magistrate, Babu S. K. Mukerjee, for inquiry and report only, Mr. Oakley had no jurisdiction to pass an order under section 476 of the Criminal Procedure Code, until the original complaint was disposed of.

Whether the case was sent to Mr. Oakley by Babu S. K. Mukerjee under the provisions of section 102 or under section 202 of the Criminal Procedure Code, it is clear that Mr. Oakley, in carrying out the order received with that order of transfer examined witnesses and recorded evidence on oath. In our opinion the proceedings conducted by Mr. Oakley, who is a Magistrate, fall within the description given in section 4, clause (m) of the Criminal Procedure Code of "judicial proceedings." That being so we must hold that, under the provisions of section 476 of the Criminal Procedure Code, Mr. Oakley had power to take proceedings under that section against the complainant for any offence referred to in section 105 of the Criminal Procedure Code committed before him or brought to his notice in the course of those proceedings, and to commit the accused for trial for having committed that offence.

We must, therefore, discharge the Rule.

Rule discharged.

ORIGINAL CIVIL.

Before Mr. Justice Chetty.

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July 1, 2, 6.

Hindu Law—Will, construction of—Direction as to management of property—Gifts—Express gift, or no words of gift—Partition—Widow's right to share on partition.

An express gift by will of property by a testator to his sons will defeat the right of a widow to a share on partition.

Debenulra Coomar Roy Chowdhry v. Brojendra Coomar Roy Chowdhry (1) referred to.

Where however a will contains no words of gift to the sons, but merely operates to postpone a partition of the property to a particular date with directions as to management in the meantime, the property vests in the widow as executrix for that purpose, and the sons take the property as on an intestacy and not by any bequest.

Kishori Mohun Ghose v. Mons Mohun Ghose (2), *Sorolah Dossee v. Bhoobun Mohun Neoghy* (3) referred to.

Where a widow is entitled to a share on partition, her right is not affected by the fact that she had already inherited a share from one of her sons.

Jugomohan Haldar v. Saradamoyee Dossee (4) referred to.

The share, which a widow takes as heiress of her son, is not *stridhan* property.

Jodoonath Dey Sircar v. Brojonath Dey Sircar (5) referred to.

ORIGINAL SUIT.

THIS was a suit brought by the plaintiffs Poorendra Nath Sen and Basudeb Sen for the construction of the will of their deceased father, Baikunta Nath Sen, under the following circumstances.

Baikunta Nath Sen, a Hindu landholder of Calcutta governed by the Bengal School of Hindu Law, died on 16th April 1895, leaving a will, which he had made and published in the Bengali language in the year 1895. By his will he appointed his wife Srimati Hemangini Dasi, the 1st defendant, his sole executrix and, except for certain Government securities,

* Original Civil Suit No. 135 of 1908.

(1) (1880) I. L. R. 17 Calc. 886.

(3) (1888) I. L. R. 15 Calc. 292.

(2) (1885) I. L. R. 12 Calc. 165.

(4) (1877) I. L. R. 3 Calc. 149.

(5) (1874) 12 B. L. R. 385.

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he bequeathed the whole of his property to his six sons, but postponed the partition of his properties by the executrix, until his youngest son attained the age of 21 years.

The provisions of the will were as follows :—

1. I make the last will revoking all previous dispositions made by me. On my demise, my immoveable and moveable properties shall be disposed of and all acts in respect thereof done according to the purport thereof.

2. I appoint Srimati Hemangini Dasi, my wife, inhabitant of No. 20, Darpanarain Tagoro's Street, Calcutta, as executrix of my will. On my demise my entire estate shall come into her hands and under her management.

3. The said executrix shall collect my dues of all descriptions and pay off debts, if there be any.

4. With reference to the state (income) of my estate, the said executrix shall meet requisite expenditures for performing the marriages and social rites and observances relating to (my) four unmarried sons, and for looking after and making management of the estate and for education and for preservation of health.

5. The said executrix shall be competent to purchase Government securities with the surplus of my estate. The said papers shall merge in the estate.

6. My sons possess no right to the Government securities, which I, having purchased or endorsed in the name of my wife Srimati Hemangini Dasi, have given to her.

7. On my youngest son Sriman Jagatpati Sen attaining the age of 21 years the said executrix shall divide my estate among and give it to my sons in equal shares.

8. If the said executrix die before making division of the estate in the manner specified above she shall, before her death, appoint to her office my third son Sriman Nirad Sen, otherwise called Sriman Nirendra Nath Sen, that is, he shall be the executor of my estate.

The testator, Baikunta Nath Sen, left him surviving three married daughters by a predeceased wife, the 1st defendant Srimati Hemangini Dasi his sole widow, and by her three

unmarried daughters and six sons, viz:—The plaintiffs, Poorondra Nath Sen and Basudeh Sen, and the 3rd to 6th defendants Nirendra Nath Sen, Jaganath Sen, Jagadish Sen and Jagatpati Sen, the last three being then infants, but all of whom have since attained their majority, the youngest having attained the age of 21 years on the 1st August 1906.

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On the 7th June 1895 the 1st defendant Srimati Hemangini Dasi applied and obtained probate of the will of the testator and took possession of all the property. Thereafter disputes arose between the parties regarding their rights and interests in the estate, and a suit was instituted in 1895 by the two eldest sons of the testator. On the 27th March 1896 judgment was delivered in the above mentioned suit, whereby the will was partially construed, and it was held that the plaintiffs had no right to immediate partition, as the youngest son had not attained the age of 21 years. The suit was accordingly dismissed. The sons, having all reached the age of 21 years, the plaintiffs called upon the executrix to make over their shares, but in spite of repeated demands she neglected and failed to do so on the ground that she was entitled to have a further share in the estate equal to that of one of her sons. The plaintiffs thereupon brought the present suit for construction of the will, and for partition, and for an order that the executrix be directed to render an account, and further that a Receiver be appointed to take charge of the estate and make over to the plaintiffs their share of the rents, issues, and profits, or that she be restrained by injunction from intermeddling with the estate.

On the 17th April 1907, after the institution of the suit, the 6th defendant, Jagatpati Sen, died.

The 1st defendant, Srimati Hemangini Dasi, in her written statement, submitted that upon the partition of the testator's estate she was entitled to a share equal to that of each of the testator's sons, and that no case had been made out for the appointment of a Receiver or for an injunction.

The 2nd, 3rd, 4th, and 5th defendants in their written statement denied taking part in the management of the estate

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except in so far as the 2nd defendant, Jaganath Sen, had carried out the instructions of the executrix, his mother. They alleged that the accounts of the estate were all along kept by Nirendra Nath Sen with the help and assistance of the plaintiffs, that he for some time had looked after the estate for the 1st defendant Srimati Hemangini Dasi. That they had all along been ready and willing to come to an amicable settlement with the 1st defendant regarding the partition of the testator's estate, and that the object of the plaintiff's suit was merely to harass the defendants, and lastly they submitted that no Receiver should be appointed to take charge of the property.

Mr. Chakravarti (with him *Mr. S. K. Mullick* and *Mr. A. N. Chaudhuri*) for the plaintiffs. The testator can deprive the widow of her share in his property on partition. *Debendra Coomar Roy Chowdhry v. Brojendra Coomar Roy Chowdhry* (1), *Strange's Hindu Law*, Vol. I, page 171, *Shama Charan's Vyavastha* 46, the *Dayabhaga* Chapter III, section 2, verses 29, 30. *Mayne's Hindu Law* (7th edn.), page 616, *Sirkar's Hindu Law* (3rd edn.), page 228, and *Ramawati Koer v. Manjhari Koer* (2) referred to. The case of *Kishori Mohun Ghose v. Moni Mohun Ghose* (3) is distinguishable from the present case. A widow on partition of her husband's property is not entitled to have the whole of the property charged with her maintenance, but only that portion of it, which is allotted to her son on partition. *Kedar Nath Coondoo Chowdhry v. Hemangini Dasi* (4). A share allotted to a mother does not become hers absolutely, so as to pass her *stridhan* heirs. *Sorolah Dossee v. Bhoobun Mohun Neoghy* (5).

Mr. B. C. Mitter and *Mr. B. K. Lahiri* for the 2nd defendant, Nirendra Nath Sen. Is the widow entitled to a share, which she inherited from her son, who is now dead, and having inherited this, can she again claim a share? I submit she cannot. If the Court holds that there is a disposition in my

(1) (1890) I. L. R. 17 Calc. 896.

(3) (1885) I. L. R. 12 Calc. 107.

(2) (1906) 4 C. L. J. 74, 77.

(4) (1886) I. L. R. 13 Calc. 336.

(5) (1898) I. L. R. 15 Calc. 292.

favour then *Debendra Coomar Roy Chowdhry v. Brojendra Coomar Roy Chowdhry* (1) is conclusive. We start in this case with a disposition, which is not binding under the Hindu Law. I submit this is a case of a will and not an intestacy: Phillips and Trevelyan's Hindu Wills, page 110, *Jugmohandas Mangaldas v. Sir Mangaldas Nathulhoy* (2), *Bhagabati Barmnya v. Kali Charan Singh* (3). No technical words are required to construe the gift by a testator. Hindu Wills Act, section 51, Theobald on Wills, Chapter XXXI, page 329. Since the Intestacy Act the heir takes as purchaser. When joint family property has been partitioned by the sons after their father's death, the widow shares equally with each of the sons, if however she is left property by her husband either by gift or legacy she is entitled only to so much as taken together with what she has received would make her share equal to that of each of her sons: *Kishori Mohun Ghose v. Moni Mohun Ghose* (4), Mayne's Hindu Law, page 618. As to the form of a decree in a suit of this nature, see the case of *Jodoonath Dey Sircar v. Brojonath Dey Sircar* (5). The case of *Jugemohan Ha'dar v. Saradamoyee Dosses* (6) does not arise, unless the Court holds there is no gift to the sons under the will. *Ramawat Koer v. Manjhari Keer* (7) is direct authority on the nature of a mother's right. On the question of *res judicata* see *Ghela Ichharam v. Sankalchand Jetha* (8) and *Shib Charan Lal v. Raghu Nath* (9).

The Advocate-General (Hon'ble Mr. S. P. Sinha) and Mr. C. R. Dass for the 1st defendant. As mother and heiress I am entitled to a share, to which the son would have been entitled, if he were alive to take it. I am entitled to a share on the estate on partition: Dayabhaga, Chapter III, section II, verse 31. What is deducted is *stridhan* property, and that being so the widow takes absolutely, if not, she takes it in the nature of a widow and the moment she dies, it goes

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(1) (1890) I.L.R. 17 Cal. 886.

(2) (1886) I. L. R. 10 Bom. 528, 576.

(5) (1874) 12 B. L. R. 385, 390.

(3) (1905) I. L. R. 32 Cal. 992;

(6) (1877) I. L. R. 3 Cal. 149.

1 C. L. J. 482, 485.

(7) (1906) 4 C. L. J. 74.

(4) (1885) I. L. R. 12 Cal. 165.

(8) (1893) I. L. R. 18 Bom. 597.

(9) (1895) I. L. R. 17 All. 174.

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hack to the sons. The share given to the brother on partition to her sons is not her *stridhan* property; that is to say, she is to get her share, if she does not get *stridhan*: *Sorolah Dassi v. Bhobun Mohun Neoghy* (1). The fact that I got a share as heiress of my son does not disentitle me to take the other share: *Jugomohan Haldar v. Saradamoyee Dossee* (2). The rule that the mother should have a share is most useful to prevent brothers from partitioning. If by the will, the property is to be given to the sons then the case of *Debendra Coomar Roy Chowdhry v. Brojendra Coomar Roy Chowdhry* (3) is against me and I cannot get a share, but this does not exclude me from maintenance.

Apart from the will, I am entitled either to a share or to maintenance: *Joytara v. Ramhari Sirdar* (4). No provision made by a Hindu testator can deprive the widow of her indefeasible right to maintenance for her life as long as his estate remains. If the testator cannot deprive the widow of her right, *a fortiori* nobody else, who inherits the testator's estate, can. Mayne's Hindu Law, page 822, paragraph 609, and Dayahhaga, Chapter II, section I, verses 57 and 59, also section 2, verses 30 and 31, and *Jugal Kishore v. Maharajah Jolindro Mohun Tagore* (5) referred to. There should be some words of gift. The testator in his will is not considering the question of giving, he is considering the best way of having the property managed: *Debendra Coomar Roy Chowdhry v. Brojendra Coomar Roy Chowdhry* (3). If there is no gift, I am entitled to a share on the majority of the sons: *Kishori Mohun Ghose v. Moni Mohun Ghose* (6).

Mr. B. C. Chatterjee (*Mr. S. R. Dass* with him) for the defendants Jaganath Sen and Jagadish Sen adopted the arguments of the Advocate-General.

Mr. Chakravarti in reply. A mere direction to an executor to pay and transfer is sufficient to show that there is a gift, *In re Bennett's Trust* (7), *In re Wrey* (8), *In re Bevan's Trusts* (9).

(1) (1888) I. L. R. 15 Calc. 292.

(2) (1877) I. L. R. 3 Calc. 149.

(3) (1890) I. L. R. 17 Calc. 886.

(4) (1884) I. L. R. 10 Calc. 638.

(5) (1884) I. L. R. 11 I. A. 68, 72.

(6) (1885) I. L. R. 12 Calc. 165.

(7) (1857) 3 K. and J. 280.

(8) (1885) L. R. 30 Ch. D. 507.

(9) (1887) L. R. 34 Ch. D. 716.

Theobald on Wills, page 584. The case of *Kishori Mohun Ghose v. Moni Mohun Ghose* (1) is distinguishable from the present.

There cannot be any *res judicata* with regard to any question of law. If there is a gift, then *Debendra Coomar Roy Choudhry v. Brojendra Coomar Roy Choudhry* (2) shows that the widow cannot take a share, but that she is entitled to maintenance provided she needs it : See *Sama Charan's Vyavastha*, page 46. If the widow does not come in as a sharer with her sons on the ground that the testator gave his entire property to his sons, then she is entitled to maintenance. *Maharani Beni Pershad Koeri v. Dudh Nath Roy* (3). Under the will the testator did contemplate a surplus and we are entitled to see what the widow received. There should therefore be an enquiry calling upon her to give an account of her dealings with the property.

Cur. adv. vult.

CHITTY J. This is a suit by two of the six sons of the late Baikanta Nath Sen against their mother and three brothers. Their mother Srimati Hemangini Dasi is now sued in her capacity as executrix of the will of her husband, in her personal capacity, and also as heiress and legal representative of the sixth son, Jagatpati Sen, who died on the 17th April 1907, after the suit was first instituted. The present suit was first instituted on the 20th August 1906. In consequence of the leave under Clause 12 having been informally granted, it was withdrawn and instituted afresh on 14th February 1908. The object of the suit is to have the will of Baikanta Nath Sen finally construed, and to have the property partitioned among those persons, who are entitled to it. An account is prayed for against Hemangini Dasi and, if necessary, administration and other consequential reliefs.

The main question for my determination is, whether Hemangini Dasi is entitled on partition not only to the share of her deceased son Jagatpati Sen (which is admitted), but

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(1) (1885) I. L. R. 12 Calc. 165. (2) (1870) I. L. R. 17 Calc. 836.

(3) (1899) 4 C. W. N. 274.

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also to another share as a mother on her sons dividing the property among themselves. The solution of this question appears to me to rest solely on the construction to be put upon the will. If that will contains an express gift of Baikanta Nath Sen's property to his sons, then the right to the widow to a share on the partition is defeated: See *Debendra Coomar Roy Chowdhry v. Brojendra Coomar Roy Chowdhry* (1), and she takes only the share inherited from her son Jagatpati, i.e., 1-6. If on the other hand the will merely operates to postpone the partition and the sons take the property as on an intestacy, it appears clear from the texts and the authorities, that the widow is not deprived of her share, as such, by reason of her having inherited a share from a deceased son; that is to say, in that case she would take 2-7ths.

Baikanta Nath Sen died on the 16th of April 1905 and his will, which was made in the year 1890, was duly proved by his widow, the sole executrix. The will directed that the property should be divided among his sons in equal shares, when his youngest son Jagatpati attained the age of 21 years. This happened on 1st August 1906. In 1895 the present plaintiffs filed a suit (No. 592 of 1895) in this Court claiming (as they now do) partition of the property. That suit was heard by Amcer Ali J., who decided that there was an absolute gift of the income of the whole estate to the executrix to be applied by her at her sole discretion up to the date fixed by the testator for division among his sons; that the postponement of their enjoyment was therefore valid; and that that suit was premature. It was accordingly dismissed. The learned Judge also held that there was no gift whatsoever to the sons, but merely a postponement of the partition. It would seem, however, that the decision of this last question was not absolutely necessary for the determination of that suit, and it cannot therefore be regarded in any way as *res judicata* between the parties. An issue was also raised in that suit, but not decided, whether the widow would be entitled to a share on partition. The translation of the will, which was

made for the purposes of probate, appears to be wanting in accuracy. Counsel on both sides have taken objections to it, Mr. Chakravarti criticising the translation of clause 1 and the Advocate-General that of Clauses 4, 6 and 7. With their assistance and that of my interpreter I have had no difficulty in ascertaining the true meaning.

Clause 1 should run : Upon my demise my moveable and immoveable properties shall vest (*benoisto*) and all affairs in connection therewith shall be performed according to the provisions hereof.

Clause 4 : The said executrix shall, regard being had to the condition of my property, defray the necessary expenses, &c., &c.

Clause 6 : The Government securities, which I have made to stand in the name of my wife, Srimati Hemangini Dasi, my sons shall have no right thereto.

Clause 7 : On my youngest son Sriman Jagatpati Sen attaining the age of 21 years the said executrix shall divide my properties among my sons in equal shares (*tullanse bibhag koria diben*).

The opinion expressed by Ameer Ali J. is not binding upon me, but it is entitled to weight and I should not venture to differ from it, unless I was compelled.

After giving the will my best consideration however I have arrived at the same conclusion, namely, that it contains no gift to the sons, but merely operates to postpone partition to a particular date, with directions as to management ; in the meantime the property being vested in the executrix for the latter purpose. I can find in the will no words of gift or words that can be interpreted as such. The sons take as the law prescribes and not by any bequest of their father. In this respect the case appears to me to be not distinguishable from the case of *Kishori Mohun Ghose v. Moni Mohun Ghose* (1). It is true, that in that case there was no intermediate gift, though the testator directed that the executors should manage the estate, until his youngest son attained majority. The

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PART II.

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1909.

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Act V of 1861 (Police), as modified up to 7th March, 1903	0 7 6 [1a. 6p.]
Act XVI of 1861 (Stage-carriages), as modified up to 1st February, 1898	0 3 6 [1a.]
Act XXIII of 1863 (Claims to Waste-lands), as modified up to 1st December, 1890	0 4 0 [1a.]
Act III of 1864 (Foreigners), as modified up to 1st September, 1906	0 3 0 [1a.]
Act VI of 1864 (Whipping), as modified up to 1st August, 1905	0 3 0 [1a.]
Act XVII of 1864 (Official Trustees), as modified up to 1st July, 1890	0 5 0 [1a.]
Act III of 1865 (Carriers), as modified up to 31st May, 1903	0 8 0 [1a.]
Act X of 1865 (Succession), as modified up to 1st July, 1890	1 8 0 [2a.]
Act III of 1867 (Gambling), as modified up to 1st January, 1905... ..	0 4 0 [1a.]
Act V of 1869 (Indian Articles of War), as modified up to 1st December, 1904	1 2 0 [3a.]
Act XX of 1869 (Volunteers), as modified up to 1st May, 1890	0 4 0 [1a.]
Act I of 1871 (Cattle Trespass), as modified up to 1st May, 1906	0 0 0 [1a.]
Act IV of 1872 (Punjab Laws), as modified up to 1st November, 1904	0 7 0 [1a.]
Act XV of 1872 (Christian Marriage), as modified up to 1st December, 1904	0 10 0 [2a.]
Act V of 1873 (Government Savings Bank), as modified up to 1st April, 1903	0 3 0 [1a.]
Act X of 1873 (Oaths), as modified up to 1st February, 1903	0 3 9 [1a.]
Act II of 1874 (Administrator General) as modified up to 1st July, 1899; with a list of Native States included within the Presidencies of Bengal, Madras and Bombay, respectively, for the purposes of the Act	0 11 0 [2a.]
Act IX of 1874 (European Vagrancy), as modified up to 1st December, 1901	0 6 6 [1a.]
Act XIV of 1874 (Scheduled Districts), as modified up to 1st October, 1895	0 0 0 [1a.]
Act XV of 1874 (Laws Local Extent), as modified up to 1st October, 1895	0 7 0 [1a.]
Act IX of 1875 (Indian Majority), as modified up to 1st May, 1906	0 2 0 [1a.]
Act of 1877 (Specific Relief), as modified up to 1st February 1904	0 11 0 [1a. 6p.]

	Ra.	A.	P.	
Act III of 1877 (Registration), as modified up to 1st August 1905 ...	0	11	0	[2a.]
Act VII of 1878 (Forests), as modified up to 1st December, 1903 ...	0	10	0	[2a.]
Act XVII of 1878 (Ferries), as modified up to 1st June, 1902 ...	0	6	0	[1a 6p.]
Act XVII of 1879 (Dekkhan Agriculturists' Relief), as modified up to 1st March, 1895 ...	0	10	0	[2a.]
Act XVIII of 1879 (Legal Practitioners), as modified up to 1st May, 1896 ...	0	7	0	[1a.]
Act VII of 1880 (Merchant Shipping), as modified up to 15th October, 1891 ...	0	10	0	[2a.]
Act V of 1881 (Probate and Administration), as modified up to July, 1890 ...	0	12	0	[2a.]
Act XV of 1881 (Factories), as modified up to 1st December 1904 ...	0	5	6	[1a 6p.]
Act XXVI of 1881 (Negotiable Instruments), as modified up to 1st August, 1897 ...	0	10	0	[1a.]
Act XVIII of 1881 (Central Provinces Land-revenue), as modified up to 1st March, 1905 ...	1	2	0	[2a.]
Act II of 1882 (Trusts), as modified up to 1st June 1903 ...	0	10	0	[1a.]
Act IV of 1882 (Transfer of Property), as modified up to 1st December, 1905 ...	0	15	0	[2a.]
Act V of 1882 (Indian Easements), as amended by the Repealing and Amending Act, 1891 (XII of 1891) ...	0	8	0	[1a.]
Act VI of 1882 (Companies), as modified up to 1st August 1906 ...	1	10	0	[3a.]
Act XII of 1882 (Salt), as modified up to 1st December 1890 ...	0	6	0	[1a.]
Act XIV of 1882 (Code of Civil Procedure), as modified up to 1st December, 1899 ...	3	0	0	[6a.]
Act XV of 1882 (Presidency Small Cause Court), as modified up to 1st June, 1906 ...	0	10	0	[2a.]
Act V of 1883 (Indian Merchant Shipping), as modified up to 1st December, 1904 ...	0	6	0	[1a.]
Act VIII of 1883 (Little Cocos and Preparis Island) as modified up to 1st October, 1902 ...	0	1	3	[1a.]
Act XIX of 1883 (Land Improvement Loans), as modified up to 1st September, 1906 ...	0	2	6	[1a.]
Act XXI of 1883 (Emigration) as modified up to 1st December, 1902 ...	0	11	0	[2a.]
Act VI of 1884 (Inland Steam-vessels), as modified up to 1st July, 1891 ...	0	0	0	[2a.]
Act VII of 1884 (Steam-ships), as modified up to 1st July, 1890 ...	0	6	0	[1a.]
Act XII of 1884 (Agriculturists Loans), as modified up to 1st February, 1903 ...	0	2	0	[1a.]
Act XVIII of 1884 (Punjab Courts), as modified up to 1st December, 1899 ...	0	7	0	[1a.]
Act XIII of 1885 (Indian Telegraph) as modified up to 1st March, 1905 ...	0	5	0	[1a.]
Act II of 1886 (Income-tax), as modified up to 1st April 1903 ...	0	8	0	[1a. 6p.]

	Ra. A. P.
Act VI of 1886 (Births, Deaths and Marriages Registration), as modified up to 1st June, 1891 ...	0 6 0 [1a.]
Act XI of 1886 (Tramways), as modified up to 1st December 1903 ...	0 9 0 [2a.]
Act XIII of 1886 (Securities), as amended by Act XII of 1891 ...	0 2 0 [1a.]
Act VII of 1887 (Suits Valuation), as modified up to 1st October 1904 ...	0 1 0 [1a.]
Act IX of 1887 (Provincial Small Cause Courts), as modified up to 1st December, 1900 ...	0 6 0 [1a.]
Act XIV of 1887 (Indian Marine), as modified up to 15th February, 1899 ...	0 8 0 [1a.]
Act V of 1888 (Inventions and Designs), as modified up to 1st July, 1903 ...	0 9 0 [2a.]
Act I of 1889 (Metal Tokens), as modified up to 1st April, 1904 ...	0 1 0 [1a.]
Act VII of 1889 (Succession Certificates), as modified up to 1st December, 1903 ...	0 5 6 [1a.]
Act X of 1889 (Ports), as modified up to 1st April, 1901 ...	0 11 0 [2a.]
Act XIII of 1889 (Cantonments), as modified up to 1st March 1895 ...	0 7 0 [1a.]
Act XV of 1889 (Official Secrets), as modified up to 1st April 1904 ...	0 3 0 [1a.]
Act IX of 1890 (Railways), as modified up to 1st June 1905 with an Index ...	1 2 0 [2a.]
Act X of 1890 (Press and Registration of Books), as modified up to 1st December, 1903 ...	0 2 3 [1a.]
Act XII of 1891 (Repealing and Amending Act), shewing the Schedules as modified up to 31st May 1902 ...	0 12 0 [1a. 6p.]
Act XIV of 1891 (Oudh Courts), as amended by the Oudh Courts Act (1891) Amendment Act, 1897 ...	0 1 3 [1a.]
Act I of 1891 (Land Acquisition), with footnotes ...	0 7 0 [1a.]
Act VIII of 1891 (Tariff), as modified up to 1st February, 1900 ...	0 9 0 [2a.]
Act IX of 1894 (Prisons), as amended by the Burma Laws Act, 1898 ...	0 7 6 [1a. 6p.]
Act IX of 1897 (Provident Funds), as modified up to 1st April, 1903 ...	0 1 6 [1a.]
Act V of 1898 (Code of Criminal Procedure), as modified up to 1st April, 1903 ...	3 10 0 [8a.]
Act VIII of 1899 (Petroleum), as modified up to 1st December 1904 ...	0 7 0 [1a.]
Act XIX of 1899 [Currency Conversion (Army)], as amended by Act VII of 1900 ...	0 1 0 [1a.]
Act III of 1900 (Prisoners), as modified up to 1st March 1905 ...	0 6 6 [1a.]
Act XV of 1903 (Extradition), as modified up to 1st December, 1904 ...	0 5 6 [1a.]
Regulation III of 1872 (Sonthal Parganas Settlement), as modified up to 1st October, 1899 ...	0 6 6 [1a.]
Regulation V of 1873 [Bengal (Eastern) Frontier], as modified up to 1st July 1903 ...	0 1 9 [1a.]
Regulation III of 1876 (Andaman and Nicobar Islands), as modified up to 1st February, 1897 ...	0 5 6 [1a.]

	Ra. A. R.
Regulation I of 1886 (Assam Land and Revenue), as modified up to 1st June, 1804	0 13 0 [2a.]
Regulation VI of 1835 Ajmor Rural Boards), as modified up to 1st February, 1805	0 5 6 [1a.]
Regulation XIV of 1887 (Upper Burma Villages), as modified up to 1st April, 1801	0 5 0 [1a.]
Regulation V of 1893 (Sonthal Pargannas Justico), as modified up to 1st October, 1890	0 4 0 [1a.]
Regulation I of 1895 (Kachin Hill Tribes), as modified up to 1st April, 1902	0 6 0 [1a.]

III.—ACTS AND REGULATIONS OF THE GOVERNOR-GENERAL OF INDIA IN COUNCIL AS ORIGINALLY PASSED.

Acts (unrepealed) of the Governor-General of India in Council from 1854 to 1908.

Regulations made under the Statute 33 Vict., Cap. 3, from No. II of 1875 to 1908. 8vo, Stitched.

[The above may be obtained separately. The price is noted on each.]

V.—TRANSLATION OF ACTS AND REGULATIONS OF THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

Acts X of 1841 and XI of 1850 (Registration of Ships), as modified up to 1st December, 1803, with foot-notes brought down to 1st Decem-ber 1901	In Urdu ...	0 2 6 [1a.]
Act XX of 1847 (Copyright), as modified up to 1st May, 1896	In Urdu ...	0 1 3 [1a.]
Act XX of 1847 (Copyright), as modified up to 1st May, 1896	In Nagri ...	0 1 3 [1a.]
Act XVIII of 1850 (Judicial Officers' Protection) with foot-notes	In Urdu ...	0 0 6 [1a.]
Act XVIII of 1850 (Judicial Officers' Protection) with foot-notes	In Nagri ...	0 0 6 [1a.]
Act XXXIV of 1850 (State Prisoners), as modified up to 30th April, 1903	In Urdu ...	0 0 6 [1a.]
Act XXXIV of 1850 (State Prisoners), as modified up to 30th April, 1903	In Nagri ...	0 0 6 [1a.]
Act XXX of 1852 (Naturalization), as modified up to 1st December, 1902	In Urdu ...	0 0 6 [1a.]
Act XXX of 1852 (Naturalization), as modified up to 1st December, 1902	In Nagri ...	0 0 6 [1a.]
Act XII of 1855 (Legal Representatives' suits) as modified up to 1st November, 1804	In Urdu ...	0 0 3 [1a.]
Act XII of 1855 (Legal Representatives' suits) as modified up to 1st November, 1804	In Nagri ...	0 0 3 [1a.]
Act XIII of 1855 (Fatal Accident), as modified up to 1st December, 1903	In Urdu ...	0 0 6 [1a.]
Act XIII of 1855 (Fatal Accident), as modified up to 1st December, 1903	In Nagri ...	0 0 6 [1a.]
Act XX of 1856, as modified up to 1st November, 1903	In Urdu ...	0 2 6 [1a.]
Act XX of 1856, as modified up to 1st November, 1903	In Nagri ...	0 2 6 [1a.]
Act XXXIV of 1858 [Lunacy (Supreme Courts)] as modified up to 30th April, 1903	In Urdu ...	0 1 0 [1a.]
Act XXXIV of 1858 [Lunacy (Supreme Courts)] as modified up to 30th April, 1903	In Nagri ...	0 1 0 [1a.]
Act XXXV of 1858 [Lunacy District Courts], as modified up to 30th April, 1903	In Urdu ...	0 1 0 [1a.]
Act XXXV of 1858 [Lunacy District Courts], as modified up to 30th April, 1903	In Nagri ...	0 1 0 [1a.]
Act XXXVI of 1858 (Lunatic Asylums), as modified up to 31st May, 1902	In Urdu ...	0 1 6 [1a.]
Act XIII of 1859 (Workman's Breach of Contract), as affected by Act XVI of 1874	In Urdu ...	0 0 3 [1a.]
Act XIII of 1859 (Workman's Breach of Contract), as affected by Act XVI of 1874	In Nagri ...	0 0 3 [1a.]
Act IX of 1860 [Employers and Workmen (Disputes)] as modified up to 1st December, 1904	In Urdu ...	0 0 3 [1a.]
Act IX of 1860 [Employers and Workmen (Disputes)] as modified up to 1st December, 1904	In Nagri ...	0 0 3 [1a.]

			Rs. A. P.		
Act XLV of 1860 (Penal Code), as modified up to	{ In Urdu	...	1	5	0 [5a.]
1st April, 1903	{ In Nagri	...	1	5	0 [5a.]
Act V of 1861 (Police), as modified up to 7th	{ In Urdu	...	0	2	0 [1a.]
March, 1903	{ In Nagri	...	0	2	0 [1a.]
Act XVI of 1861 (Stage-Carriages), as modified up to 1st February, 1898	{ In Urdu	...	0	1	3 [1a.]
	{ In Nagri	...	0	1	3 [1a.]
Act III of 1864 (Foreigners), as modified up to	{ In Urdu	...	0	1	0 [1a.]
1st September, 1906	{ In Nagri	...	0	1	0 [1a.]
Act VI of 1864 (Whipping), as modified up to	{ In Urdu	...	0	1	6 [1a.]
1st April, 1900	{ In Nagri	...	0	1	0 [1a.]
Act III of 1865 (Carriers), as modified up to	{ In Urdu	...	0	0	0 [1a.]
31st May, 1903	{ In Nagri	...	0	0	0 [1a.]
Act III of 1867 (Gambling), as modified up to					
1st December, 1898	In Nagri	...	0	2	0 [1a.]
Act V of 1869 (Indian Articles of War), as modified up to 1st January, 1895	In English,				
Urdu and Nagri	{ Bound	...	3	0	0 [5a.]
	{ Unbound	...	2	8	0 [5a.]
Act VII of 1870 (Court-fees), as modified up to					
1st December, 1896	In Urdu	...	0	8	3 [2a. 6p.]
Ditto ditto as modified up to					
1st October, 1899	In Nagri	...	0	8	0 [1a.]
Act I of 1871 (Cattle-trespass) as modified up	{ In Urdu	...	0	1	0 [1a.]
to 1st December	{ In Nagri	...	0	1	0 [1a.]
Act XXIII of 1871 (Pensions),	{ In Urdu	...	0	0	0 [1a.]
	{ In Hindi	...	0	0	0 [1a.]
Act I of 1872 (Evidence), as modified up to 1st	{ In Urdu	...	0	8	0 [2a.]
May, 1908	{ In Nagri	...	0	8	0 [2a.]
Act IV of 1872 (Punjab Laws), as modified up to					
1st November, 1904	In Urdu	...	0	2	8 [1a. 6p.]
Act IX of 1872 (Contract), as modified up to	{ In Urdu	...	0	0	0 [3a.]
1st September, 1899	{ In Nagri	...	0	0	0 [3a.]
Act XV of 1872 (Christian Marriage), as modified up to 1st April, 1891	{ In Urdu	...	0	4	0 [2a.]
	{ In Nagri	...	0	4	0 [2a.]
Act V of 1873 (Government Savings Bank), as modified up to 1st April, 1903	{ In Urdu	...	0	0	0 [1a.]
	{ In Nagri	...	0	0	0 [1a.]
Act VIII of 1873 (Northern India Canal and Drainage), as modified up to 15th July, 1909	{ In Urdu	...	0	3	3 [1a.]
	{ In Nagri	...	0	3	3 [1a.]
Act X of 1873 (Oaths), as modified up to 1st February, 1903	{ In Urdu	...	0	0	0 [1a.]
	{ In Nagri	...	0	1	0 [1a.]
Act IX of 1875 (Majority), as modified up to 1st	{ In Urdu	...	0	0	3 [1a.]
May, 1906	{ In Nagri	...	0	0	3 [1a.]
Act of 1877 (Specific Relief), as modified up to	{ In Urdu	...	0	4	6 [1a. 6p.]
1st February, 1904	{ In Nagri	...	0	4	3 [1a. 6p.]
Act III of 1877 (Registration), as modified up	{ In Urdu	...	0	4	3 [2a.]
to 1st December, 1896	{ In Nagri	...	0	4	6 [2a.]
Act I of 1878 (Opium), as modified up to 1st December, 1896	In Nagri	...	0	1	6 [1a.]
Act VII of 1878 (Forests), as modified up to 1st	{ In Urdu	...	0	4	0 [1a. 6p.]
December, 1903	{ In Nagri	...	0	3	0 [1a. 6p.]
Act XI of 1878 (Arms), as modified up to 1st May, 1904	{ In Urdu	...	0	2	0 [1a.]
	{ In Nagri	...	0	2	0 [1a.]
Act XVI of 1878 (Northern India Ferries), as modified up to 1st June, 1902	{ In Urdu	...	0	2	0 [1a.]
	{ In Nagri	...	0	2	0 [1a.]

				Ru. A. P.
Act XVIII of 1879 (Legal Practitioners), as modified up to 1st May 1890	{In Urdu In Nagri	... 0 2 6 ... 0 2 6	{1a. 1a.	
Act XV of 1881 (Factories), as modified up to 1st April 1891	{In Urdu In Nagri	... 0 1 6 ... 0 1 6	{1a. 1a.	
Act XVIII of 1881 (Central Provinces Land Revenue), as modified up to 1st November, 1898	{In Urdu In Nagri	... 0 0 0 ... 0 0 0	{1a. 6p. 1a. 6p.	
Act IV of 1882 (Companies), as modified up to 1st August, 1900	{In Urdu In Nagri	... 0 0 0 ... 0 0 0	{2a. 2a.	
Act VI of 1882 (Companies), as modified up to 1st August, 1900	{In Urdu In Nagri	... 0 13 9 ... 0 14 0	{3a. 3a.	
Act XIV of 1882 (Code of Civil Procedure), as modified up to 1st December, 1899	In Urdu	... 1 4 0	{1a.	
Act XIX of 1883 (Land Improvement Loans), as modified up to 1st September, 1900	{In Urdu In Nagri	... 0 1 0 ... 0 1 0	{1a. 1a.	
Act XXI of 1883 (Emigration), as modified up to 1st December, 1902	{In Urdu In Nagri	... 0 4 0 ... 0 4 0	{1a. 6p. 1a. 6p.	
Act IV of 1884 (Explosives), as modified up to 1st May, 1896	{In Urdu In Nagri	... 0 1 3 ... 0 1 3	{1a. 1a.	
Act VI of 1884 (Inland Steam-vessels), as modified up to 1st July, 1891	{In Urdu In Nagri	... 0 3 0 ... 0 3 0	{1a. 6p. 1a. 6p.	
Act XII of 1884 (Agriculturists Loans), as modified up to 1st September, 1900	{In Urdu In Nagri	... 0 0 6 ... 0 0 6	{1a. 1a.	
Act XVIII of 1884 (Punjab Courts), as modified up to 1st December 1899	In Urdu	... 0 2 0	{1a.	
Act II of 1885 (Negotiable Instruments Amendment),	In Urdu	... 0 0 9	{1a.	
Act III of 1885 (Transfer of Property Amendment),	In Urdu	... 0 0 3	{1a.	
Act X of 1885 (Transfer of Property Amendment),	In Urdu	... 0 0 3	{1a.	
Act XIII of 1885 (Transfer of Property Amendment),	In Urdu	... 0 1 6	{1a.	
Act XXI of 1885 (Madras Civil Courts Amendment),	In Urdu	... 0 0 3	{1a.	
Act II of 1886 (Income tax), as modified up to 1st April, 1903	{In Urdu In Nagri	... 0 3 0 ... 0 3 0	{1a. 6p. 1a. 6p.	
Act IV of 1886 (Amending Section 265 of Contract Act),	In Urdu	... 0 0 3	{1a.	
Act VI of 1886 (Births, Deaths and Marriage Registration),	In Urdu	... 0 1 3	{1a.	
Act VII of 1886 (Registration Amendments),	In Urdu	... 0 0 3	{1a.	
Act X of 1886 (Criminal Law Amendment),	In Urdu	... 0 0 9	{1a.	
Act XI of 1886 (Tramway), as modified up to 31st December, 1900	{In Urdu In Nagri	... 0 3 3 ... 0 3 3	{1a. 1a.	
Act XIII of 1886 (Securities), as amended by the Repealing and Amending Act, 1891	{In Urdu In Nagri	... 0 0 0 ... 0 0 0	{1a. 1a.	
Act VI of 1887 (Companies Amendment),	In Urdu	... 0 0 3	{1a.	
Act VII of 1887 (Suits, Valuation),	In Urdu	... 0 0 6	{1a.	
Act IX of 1887 (Provincial Small Cause Courts), as modified up to 1st December, 1896	{In Urdu In Nagri	... 0 2 3 ... 0 2 6	{1a. 1a.	
Act X of 1887 (Native Passenger Ships),	In Urdu	... 0 1 6	{1a.	

				Rs. A. P.			
Act XII of 1887 (Bengal, North-West Provinces and Assam Civil Courts) ...	In Urdu	...	0 1 3	[1a.]			
Act XIV of 1887 (Indian Marine), as modified up to 15th February, 1899 ...	In Nagri	...	0 1 3	[1a.]			
Act XV of 1887 (Burma Military Police) ...	In Urdu	...	0 3 6	[1a.]			
Act XVIII of 1887 (Allahabad University) ...	In Nagri	...	0 3 6	[1a.]			
Act III of 1888 (Police), as modified up to 1st March, 1893 ...	In Urdu	...	0 0 9	[1a.]			
Ditto (as passed) ...	In Nagri	...	0 0 0	[1a.]			
Act IV of 1888 (Indian Reserve Forces), as modified up to 1st March, 1893 ...	In Urdu	...	0 1 0	[1a.]			
Ditto (as passed) ...	In Nagri	...	0 0 6	[1a.]			
Act V of 1888 (Invention and Designs) ...	In Nagri	...	0 0 6	[1a.]			
Act VI of 1888 (Debtors) ...	In Urdu	...	0 0 3	[1a.]			
Act VII of 1888 (Civil Procedure Amendment) ...	In Nagri	...	0 0 3	[1a.]			
Act I of 1889 (Metal Tokens), as modified up to 1st April, 1904 ...	In Urdu	...	0 2 3	[1a.]			
Act II of 1889 (Measures of Length) ...	In Nagri	...	0 0 6	[1a.]			
Act VI of 1889 (Merchandise Marks), as modified up to 1st February, 1904 ...	In Urdu	...	0 0 6	[1a.]			
Act VI of 1889 (Probate and Administration) ...	In Nagri	...	0 0 3	[1a.]			
Act X of 1889 (Ports), as modified up to 1st June, 1894 ...	In Urdu	...	0 0 3	[1a.]			
Act XIII of 1889 (Cantonments), as modified up to 1st March, 1895 ...	In Nagri	...	0 1 0	[1a.]			
Act XV of 1889 (Official Secrets), as modified up to 1st April, 1904 ...	In Urdu	...	0 2 0	[1a.]			
Act XVI of 1889 (Central Provinces Land Revenue) ...	In Nagri	...	0 0 6	[1a.]			
Act XX of 1889 (Lunatic Asylums Amendment) ...	In Urdu	...	0 0 8	[1a.]			
Act I of 1890 (Revenue Recovery) ...	In Nagri	...	0 5 0	[2a.]			
Act II of 1890 (Amending Acts XVII of 1854, X of 1865, II of 1874 and V of 1881) ...	In Urdu	...	0 6 0	[2a.]			
Act V of 1890 (Indian Forest and Burma Forest Amendment) ...	In Nagri	...	0 3 0	[1a. 8p.]			
Act VI of 1890 (Charitable Endowments) ...	In Urdu	...	0 0 9	[1a.]			
Act VIII of 1890 (Guardians and Wards) ...	In Nagri	...	0 1 6	[1a.]			
Act IX of 1890 (Railways), as modified up to 1st June, 1905 ...	In Urdu	...	9 1 6	[1a.]			
Act IX of 1890 (Railways), as modified up to 1st May, 1896 ...	In Nagri	...	0 3 0	[1a.]			
Act X of 1890 (Press and Registration of Books Amendment) ...	In Urdu	...	0 3 0	[1a.]			
Act XI of 1890 (Prevention of Cruelty to Animals) ...	In Nagri	...	0 8 0	[1a.]			
	In Urdu	...	0 8 0	[2a.]			
	In Nagri	...	0 0 3	[1a.]			
	In Urdu	...	0 0 3	[1a.]			

				Rs. A. P.			
Act XVIII of 1890 (Emigration Amendment)	In Urdu	...	...	0	0	3	[1a.]
Act XIX of 1890 (Salt-Amendment)	In Urdu	...	...	0	0	3	[1a.]
Act XX of 1890 (North-Western Provinces and Oudh)	In Urdu	...	...	0	1	0	[1a.]
Act V of 1891 (Ports Act Amendment)	In Urdu	...	...	0	0	3	[1a.]
Act X of 1891 (Indian Criminal Law Amendment)	In Urdu	...	...	0	0	3	[1a.]
Act XIV of 1891 (Oudh Courts)	In Urdu	...	...	0	0	6	[1a.]
Act XVII of 1891 (Bankers' Books Evidence), as modified by Acts I of 1893 and XII of 1900	In Urdu (In Nagri)	...	...	0	0	3	[1a.]
Act II of 1892 (Christian Marriage Validation)	In Urdu	...	...	0	0	3	[1a.]
Act IV of 1892 (Bengal Court of Wards Amendment)	In Urdu	...	...	0	0	6	[1a.]
Act VI of 1892 (Limitation Act and Civil Procedure Code Amendment)	In Urdu	...	...	0	0	3	[1a.]
Act IV of 1893 (Partition)	In Urdu	...	...	0	0	3	[1a.]
Act I of 1894 (Land Acquisition)	In Urdu (In Nagri)	...	...	0	2	3	[1a. 6p.]
Act III of 1894 (Criminal Procedure and Penal Codes Amendment)	In Urdu	...	...	0	0	3	[1a.]
Act V of 1894 (Civil Procedure Code Amendment)	In Urdu (In Nagri)	...	...	0	0	3	[1a.]
Act VIII of 1894 (Tariff), as modified up to 1st October, 1903	In Urdu (In Nagri)	...	...	0	4	0	[1a.]
Act IX of 1894 (Prisons)	In Urdu (In Nagri)	...	...	0	1	3	[1a.]
Act VII of 1895 (Civil Procedure Code and Laws Act Amendment)	In Urdu (In Nagri)	...	...	0	0	3	[1a.]
Act XII of 1895 (Companies—Memorandum of Association)	In Urdu	...	...	0	3	0	[1a.]
Act XIV of 1895 (Pilgrim Ships)	In Urdu	...	...	0	1	3	[1a.]
Act II of 1896 (Cotton-duties)	In Urdu (In Nagri)	...	...	0	1	0	[1a.]
Act VI of 1896 (Indian Penal Code Amendment)	In Urdu	...	...	0	0	3	[1a.]
Act VIII of 1896 (Inland Bonded Warehouses)	In Urdu (In Nagri)	...	...	0	0	3	[1a.]
Act XII of 1896 (Excise), as modified up to 1st August, 1905	In Nagri	...	...	0	3	3	[1a.]
Act I of 1897 (Act XXXVII of 1850 Amendment)	In Urdu (In Nagri)	...	...	0	0	3	[1a.]
Act II of 1897 (Criminal Tribes Act Amendment)	In Urdu	...	...	0	0	3	[1a.]
Act III of 1897 (Epidemic Diseases)	In Urdu (In Nagri)	...	...	0	0	3	[1a.]
Act IV of 1897 (Fishes)	In Urdu (In Nagri)	...	...	0	0	3	[1a.]
Act IV of 1897 (Negotiable Instruments Act Amendment)	In Urdu (In Nagri)	...	...	0	0	3	[1a.]

				Rs. A. P.			
Act VII of 1897 (Indian Emigration Act)	{ In Urdu	...	0 0 3	[1a.]			
Amendment) ...	{ In Nagri	...	0 0 0	[1a.]			
Act VIII of 1897 (Reformatory Schools) ...	{ In Urdu	...	0 0 3	[1a.]			
	{ In Nagri	...	0 0 0	[1a.]			
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up to 1st April, 1903 ...	{ In Nagri	...	0 0 0	[1a.]			
Act X of 1897 (General Clauses) ...	{ In Urdu	...	0 1 0	[1a.]			
	{ In Nagri	...	0 1 0	[1a.]			
Act XII of 1897 (Local Authorities Emer-	{ In Urdu	...	0 0 3	[1a.]			
gency Loans) ...	{ In Nagri	...	0 0 3	[1a.]			
Act XV of 1897 (Cantonments) ...	In Urdu	...	0 0 3	[1a.]			
Act I of 1898 (Stage Carriages Act (1861)	{ In Urdu	...	0 0 3	[1a.]			
Amendment) ...	{ In Nagri	...	0 0 3	[1a.]			
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	{ In Nagri	...	0 0 0	[1a.]			
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Act XVIII of 1899 (Land Improvement	{ In Urdu	...	0 0 3	[1a.]			
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Act IV of 1900 (Indian Companies Branch Register) {In Urdu ... {In Nagri	...	0	0	3 [1a.]
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Act X of 1900 (Census) {In Urdu ... {In Nagri	...	0	0	0 [1a.]
Act II of 1901 (Indian Tolls (Army)) {In Urdu ... {In Nagri	...	0	0	0 [1a.]
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tion 62 of the Chota Nagpore Landlord and Tenant Procedure Act is not controlled by section 44A of the said Act. When a rent suit is dismissed under the first clause of section 77, read with section 62, of the Act, another suit for the same rent is maintainable within the period of six months— <i>Held</i> by Coxo J., that such a suit is not maintainable by virtue of section 44A of the Act.	
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CIVIL PROCEDURE CODE, Act XIV of 1882, ss. 100, 108, 157, 158, 622— <i>Adjourned hearing</i> — <i>Ex parte decree</i> — <i>Retinal of case</i> .—Where a suit was decreed <i>ex parte</i> on the adjourned day of hearing after taking evidence in the case,— <i>Held</i> , that the order was passed under section 100 read with section 157 of the Civil Procedure Code— <i>Held</i> further, that the order could be set aside on an application under section 108, Civil Procedure Code.— <i>Mariannissa v. Ramkalpa Gorain</i> 1 L. R. 34 Calc. 235 and <i>Cooke v. Equitable Coal Company</i> , 8 C. W. N. 621 followed in principle — <i>Sitara Begam v. Tulsi Singh</i> , 1 L. R. 23 All. 462, distinguished	
NAOFNDRA KUMAR BASU v. NARIN MANDAL, (1908) 1 L. R. 36 Calc.	180
CIVIL PROCEDURE CODE, Act XIV of 1882, ss. 244, 205, 622— <i>Rateable distribution</i> — <i>Different judgment debtors</i> — <i>Appeal against order under section 295, if lies</i> — <i>Jurisdiction of High Court to interfere under section 622</i> —An order under section 295 of the Civil Procedure Code passed as between parties who are not the same as in the decree in execution of which assets were realized under section 295 is not a decree under section 244, and no appeal lies against the order, and the order of the District Judge on appeal, setting aside the order of the Munsif, is without jurisdiction— <i>Held</i> further, that when an order is wholly without jurisdiction, the High Court should interfere under section 622— <i>Genesh Pas Dargia v. Shiva Lalshman Bhakat</i> , 1 L. R. 20 Calc. 563, not applicable. <i>Ramasamy Chettiar v. Ori</i> 1 L. R. 26 Mad. 176 followed <i>Dayaram Jagjivan v. Govardandas Dayaram</i> , 1 L. R. 28 Bom. 458, distinguished <i>Prosunno Kumar Sanyal v. Kalidas Sanyal</i> , 1 L. R. 19 Calc. 683, 1 L. R. 191 A. 166, referred to	
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CONSPIRACY—Auction sale— <i>Fraud</i> — <i>Combination among bidders not to bid against each other</i> — <i>Case of actors</i> — <i>Fraud, effect of one of, to be respectively pleaded</i> —A combination among bidders at an auction not to bid against each other, even if the combination amounts to	



a "knock-out," does not give rise to an action at the suit of the vendor.—*Arbha Prasad Singh v. R. H. Whitwell* 6 C. L. J. 111, *Fuller v. Abrahams*, 3 Brod. and B. 110, *Leri v. Leri*, 6 Car. and P. 239, dissented from, *Doodbhoy v. Ramall*, 15 Jur. 257, referred to—Allegations of fraud must be specifically pleaded; general allegations, however strong, are insufficient to amount to an averment of fraud of which any Court ought to take notice.—*Wallingford v. Mutual Society*, L. R. 5 A. C. 685, and *Ganga Narain Gupta v. Tiluckram Chaudhry*, I. L. R. 15 Cal. 633, followed.

JYOTI PROKASH NANDI v. JHONMULL JONHNEY, (1909) I. L. R. 36 Cal. 134

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DECREE, ex parte: See **CIVIL PROCEDURE CODE (ACT XIV OF 1882), ss. 109, 108, 157, 158, 622** 189

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EUROPEAN BRITISH SUBJECT, CRIMINAL PROCEEDING AGAINST—Competency of native mofussil Magistrate to hold an inquiry against a European British subject under s. 107 of the Criminal Procedure Code (Act V of 1898)—Applicability of s. 443 of the Code to such inquiry.—The provisions of section 443 of the Criminal Procedure Code apply to an inquiry held under section 107 thereof. The party against whom such an inquiry is instituted is in the position of an accused. *Queen-Empress v. Mutasaddi Lal*, I. L. R. 21 All. 107, *Queen-Empress v. Mona Puna*, I. L. R. 16 Bom. 661 and *Jhota Singh v. Queen-Empress*, I. L. R. 23 Cal. 493 referred to.

HORNCROFT v. EMYERON, (1909) I. L. R. 36 Cal. 163

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HINDU LAW—Pitridatto Ayautuko Stridhan, succession to—Son or married daughter, preferential heir—Dayabhaga—"Kanya,"—meaning of.—Under the Dayabhaga School of Hindu Law, son is the preferential heir to a married daughter to pitridatto ayautuka stridhan, property of the mother.—The word "kanya" in Dayabhaga, Chap. IV, sec. 11, para. 18, means an unmarried daughter.—*Ram Gopal Bhattacharjee v. Narain Chandra Bandopadhyay*, I. L. R. 33 Cal. 316; 10 C. W. N. 510; 3 C. L. J. 15 followed.

PROSANNO KUMAR BOSE v. SARAT SHOSHI GHOSH, (1909) I. L. R. 36 Cal. 86

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KANYA, MEANING OF: See **HINDU LAW** 86

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LIMITATION—Distraint—Compensation, suit for—Illegal distress—Limitation Act (XV of 1877), Sch. II, Arts. 36, 39, 49.—Tort—"Malfeasance"—"Trespass upon immovable property."—*Per RAMPINI*, A. C. J. A suit for compensation for illegal distress, and

cutting and carrying off standing crops is governed by Art. 36, Sch. 11 of the Limitation Act, such acts of tort constituting "malfeasance" within the terms of that Article—*Mohesh Chandra Das v. Hari Kar*, 9 C. W. N. 376 approved *Mangun Jha v. Dolhin Golab Korr*, 1. L. R. 25 Calc. 692 distinguished.—*Per Doss J.* Wrongfully cutting and carrying away crops amount to "trespass upon immovable property" and to "wrongfully taking specific moveable property" within the meaning of Arts. 39 and 49, Sch. 11 of the Limitation Act; and a suit for compensation for such acts is governed partly by Art. 39 and partly by Art. 49 of the Act.—*Mangun Jha v. Dolhin Golab Korr*, 1. L. R. 25 Calc. 692, referred to.

JADU NATR DANDPUT v. HARI KAR, (1903) 1. L. R. 36 Calc.	141
LIMITATION ACT (XV OF 1877), SCH. 11, ARTS 36, 39, 49: See LIMITATION	141
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MAHOMEDAN LAW— <i>Divorce—Talak—Dower, suit for—Limitation.</i> — Under the Mahomedan Law, absence of the wife does not make the pronouncement of <i>talak</i> void and inefficacious.— <i>Furzund Hossein v. Janu Bibi</i> , 1. L. R. 4 Calc. 588 and <i>Sarabas v. Rabiabai</i> , 1. L. R. 30 Bom. 537 referred to and discussed. FUL CHAND v. NAZAB ALI CROWDERY, (1903) 1. L. R. 36 Calc.	184
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REMAND TO CUSTODY: See BAIL	166, 174
RIOTING— <i>Common object of unlawful assembly—Necessity of express finding on the part of the lower Courts in their judgments—Criminal P.C. 424—Indian Penal Code 424—Where the common charge to be to enforce a right or supposed right, and there was no dispute as to the common object in the lower Courts, which did not, therefore, discuss the question or come to any express finding in so many words on the point, it was held that they had impliedly found the common object of the assembly to be the same as stated in the charge, and that the accused had been in no way prejudiced.</i> — <i>Sabir v. Queen-Emress</i> , 1. L. R. 22 Calc 276, <i>Porosh Nath Sircar v. Emperor</i> , 1. L. R. 33 Calc. 295 distinguished.	
DASARATHI MAHAPATRA v. RAGHU SARU, (1908) 1. L. R. 36 Calc.	158
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TALAK: See MAHOMEDAN LAW	184
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TRANSFER OF PROPERTY ACT (IV OF 1882) s. 93— <i>Right to redeem, after the time allowed—Court accepting money before the order absolute—Such acceptance, effect of.</i> —A person, who does not deposit the redemption money within the time allowed, can redeem afterwards, before a final order is made under section 93 of the Transfer of Property Act.	
BEPIN BEHARY SHAHA v. MONKUDA LAL GHOSH, (1908) 1. L. R. 36 Calc.	122

Hemangini Dasi is entitled to 2/7ths, 1/7th as heiress of her deceased son Jagatpati Sen, and the other 1/7th in her right as a Hindu mother on partition. Enquire of what that estate consisted (1) at the death of Baikanta Nath Sen, (2) at the date fixed by the testator for partition, viz., 1st August 1906 Hemangini Dasi to account for all receipts and disbursements subsequent to the last-mentioned date (this is consented to by the Advocate-General on her behalf). Inquire what *stri-dhan* property has come to Srimati Hemangini Dasi from her husband and take it into account in estimating the 1/7th share, which she takes as mother on the partition.

Costs of all parties of this suit, including reserved costs, to come out of the estate. Commissioner for partition to be named by the parties before the Registrar within a fortnight.

Commissioner to have power to make separate returns as to the moveable and immoveable properties respectively. Commissioner to have liberty to sell the properties. Executrix to divide the approximate net income in the meantime among the various beneficiaries.

Attorney for the plaintiffs : *O. C. Bose.*

Attorneys for the defendants : *Bonnerjee and Halder, A. K. Thakur, K. K. Dutt and P. C. Law.*

H. C. M.

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APPELLATE CIVIL.

Before Mr. Justice Brett, Mr. Justice Mitra and Mr. Justice Coxe.

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Hindu Law—Pitridatta Ayautuka Stridhan, succession to—Son or married daughter, preferential heir—Dayabhaga—"Kanya,"—meaning of.

Under the Dayabhaga School of Hindu Law, a son is the preferential heir to a married daughter to *pitridatta ayautuka stridhan* property of the mother.

The word "*kanya*" in Dayabhaga, Chap. IV. sec. ii, para. 16, means an unmarried daughter.

Ram Gopal Bhattacharjee v. Narain Chandra Bandopadhyaya (1), followed.

SECOND appeals by the plaintiffs, Prasanna Kumar Bose and others.

These appeals arose out of four suits brought by the four plaintiffs to recover possession of certain immoveable property on declaration of title thereto.

The plaintiffs are the sons and the defendants are the married daughters of one Saroda Moyi Basu. The property in dispute was the *pitridatta stridhan* of the said Saroda Moyi, which was given to her by her father by a deed of gift, dated the 15th of June 1853. The gift was made after her marriage. On the 7th of October 1903 she died, leaving four sons and three daughters surviving her. Three of the sons applied to the Collector to be registered as heirs by right of inheritance from their mother. The applications were opposed by the daughters,

* Appeal from Appellate Decree, No. 2095 of 1906, against the decree of Ananda Nath Majumdar, Subordinate Judge of Mymensingh, dated Aug. 16, 1906, reversing the decree of Syama Charan Ukil, Munsif of Tangail, dated March 27, 1906, and three other analogous appeals, Nos. 2441, 2442 and 2443 of 1906.

(1) (1905) I. L. R. 33 Cal. 215; 10 C. W. N. 510; 3 C. L. J. 16.

and the learned Collector passed an order on the 24th of August 1904, directing the names of the daughters to be registered, under the Land Registration Act, as proprietors of the property by right of inheritance from Saroda Moyi. Subsequently, the four brothers instituted the aforesaid four suits.

The defendants *inter alia* pleaded that they were the preferential heirs, and as such the plaintiffs' suits ought to be dismissed. The Court of first instance, in the absence of the defendants, decreed the plaintiff's suits, holding that the property was *ayautuka stridhan* of the mother, and that the plaintiffs as sons were preferential heirs to the married daughters.

On appeal, the learned Subordinate Judge set aside the judgment of the Court of first instance and dismissed the suits.

Against these decisions the plaintiffs appealed to the High Court.

The appeal came on for hearing before Mr. Justice Brett and Mr. Justice Coxe, and there being a difference of opinion their Lordships delivered the following judgments:—

BRETT J. The appellants in these four appeals are the four sons and the respondents are the three married daughters of Saroda Moyi Basu. On the 15th June 1853, Saroda Moyi received a gift from her father of taluk Roy Chandra Sarma No. 5480. This was after her marriage. On the 7th October 1903 she died, leaving four sons and three daughters her surviving. Three of the sons, other than the appellant in appeal No. 2095 of 1906, applied to the Collector to be registered as heirs of the taluk by right of inheritance from their mother. They were opposed by the three daughters, and, on the 24th August 1904, the applications of the sons were refused and an order was passed to register the three daughters as proprietors of the taluk by right of inheritance from Saroda Moyi Basu. The four brothers then filed four suits on the 5th July 1905 and following days, praying for declaration of their title each to one-fourth share in the taluk and for recovery of possession.

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In the Court of first instance the suits were heard *ex parte* in the absence of the defendants, and were decreed, the Munsif holding that the taluk was *ayauvlu stridhan* of the mother and that the plaintiffs as sons were preferential heirs to the married daughters.

On appeal the lower Appellate Court has set aside the judgment and decree of the Munsif in all the cases and has dismissed all the suits.

The plaintiffs, the four sons, have appealed to this Court in four appeals. These have been heard together and will all be governed by this judgment.

Admittedly the taluk, which is the subject of the present litigation, is the *pitridatta ayautula stridhan* of Snroda Moyi Basu, and the question, which we have to decide, is whether the sons or the married daughters are the preferential heirs.

The learned Subordinate Judge has gone with great care and detail through the various authorities, and has come to the conclusion that the balance of authority is strongly in favour of the married daughters. In this appeal it has been argued by the learned Counsel for the appellants that the learned Subordinate Judge has erred in law in the view which he has taken of those authorities, and that in fact they support the contrary view that the sons are the preferential heirs.

The determination of the matter in dispute depends on the construction, which should be placed on the passage in paragraph 16, s. 2, Chapter IV of the edition of the *Dayabhaga* of Jimutavahana (as translated by Colobrooke). In that passage Jimutavahana has adopted the law as laid down by Manu in Sloka 198, Chapter IX. The passage, which is given in the vernacular in the judgment of the Subordinate Judge, runs as follows :—"As for a passage of Manu. "The wealth of a woman, which has been in any manner given to her by her father, let the Brahmini damsel take, or let it belong to her offspring." Since the text specifies "given by her father," the meaning must be that property, which was given to her by her father even at any time other than her nuptials, shall

belong exclusively to the daughter, and the term Brahmini is merely illustrative, indicating that a daughter of the same tribe inherits." The words used, which are translated as the 'Brahmini damsel,' are '*Brahmini kanya*,' and the whole contest has centred round the point, whether '*kanya*' should be translated to mean generally any daughter, and so to include married or widowed daughters, or should be confined to the unmarried daughters alone. If the first meaning be accepted, the defendants must succeed in these suits; if the second be preferred, the plaintiffs must succeed.

Now it is suggested by the learned Counsel for the appellants that the first and obvious way to ascertain the meaning of the word "*kanya*" in the passage is to search through Chapter IV of the Dayabhaga, and see where the word "*kanya*" occurs, and what is the meaning which has been given to it. In s. I, the word is used twice as meaning a bride at the time of marriage, which may be taken to imply a maiden daughter. In s. II, irrespective of the passage in dispute, the term "*kanya*," wherever it occurs, means maiden or unmarried daughter. In s. III, "*kanya*" is used in the same sense, except in verses 32 and 33. These are the passages on which the Subordinate Judge relies to expose, as he says, the fallacy of the hypothesis that the word "*kanya*" is used by Jimutavahana in the restricted sense of unmarried daughter. It is unfortunate that the two passages, on which the Subordinate Judge relies, are held by some commentators to be of doubtful authenticity, and by others have been pronounced to be interpolations, and that in a case on the Original Side of this Court, lately heard by a Special Division Bench, of which one of us was a member, it was held that the two passages were forgeries. The final decision on that point will no doubt rest with their Lordships of the Privy Council, but meanwhile it is apparent that the result of the search through Chapter IV of the Dayabhaga goes strongly to support the argument that the word "*kanya*" is used in that work to mean an unmarried daughter.

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Any argument based on the use of the word "*kanya*" in modern conversation and literature seems to me to be dangerous. In the course of 300 years words in all languages change and modify their original meaning.

The other method of ascertaining the meaning of the word "*kanya*" as used in the passage is to look first to the context, and then to enquire and ascertain how the passage has been interpreted by other authors and commentators. The decision of this case depends, as I have already noticed, on the meaning to be given to the word "*kanya*" in that passage.

Now, in dealing with the question by the light of opinions expressed by authors and commentators, we are met with a difficulty, which the Subordinate Judge has either not recognized or ignored, that these high authorities, in the works which they have produced and in the different editions of their works, have contradicted themselves and have displayed a wavering of opinion, which cannot but have the effect of weakening confidence in them. In fact the point appears to be one of considerable doubt and difficulty, and in dealing with it I have endeavoured to give to the various authorities a most careful and impartial study and consideration.

Dealing with the question first on principle, we have it that the property in suit having been given to Saroda Meyi Basu after her marriage comes under the head of *ayautuka stridhan*. In the ordinary line of inheritance to *ayautuka stridhan* the sons succeed as preferential heirs to the married or widowed daughters. In the cases before us the property can only go to the married daughters, if the Hindu law makes an exception between *ayautuka stridhan*, which is "*pitridatta*," or given by the father, and ordinary *ayautuka stridhan*. The case for the defendants is that the texts, on which they rely, lay down a special line of succession to *pitridatta ayautuka stridhan*. Apparently it is not suggested that the exception is governed by either the principle of spiritual benefit or natural affection.

The learned Subordinate Judge has however suggested that it is governed by a "natural desire to make a sort of equitable distribution of the effects of the parents amongst children, male and female," and "to a very laudable desire on the part of the sages to provide for helpless and indigent relations." It does not however appear to follow of necessity that married daughters should be more indigent and helpless than sons.

Dealing next with the authorities we have first to take Chapter IV, s. 2, of the *Dayabhaga*, in which the passage occurs. The chapter first lays down the general rule of succession with regard to the separate property of a woman, and provides that it devolves in the first instance in equal shares on her sons and unmarried daughters, and in support of this view quotes passages from *Sancha*, *Lichita* and *Devala*. It then goes on to lay down the order of succession of other heirs, and in paragraph 11, when noting that the son's son is preferred to the daughter's son, it explains that the reason of it is that the married daughter is debarred from the inheritance by the son. In paragraphs 13 to 15 the nature of *yautuka stridhan*, or property received by a woman at her nuptials, is explained, and it is pointed out that the authorities, *e.g.*, *Narada*, *Catyayana*, and *Yajnavalka*, which give the preference to all unmarried daughters over sons, are referring to property of that class only. Then follows paragraph 16, in which the passage occurs, on which the decision of this case mainly depends. It deals with property given to a woman by her father "in any manner" "even at any time besides that of the nuptials," and provides that it shall be taken by the *Brahmini* damsel, or let it belong to her offspring. "Her offspring" is generally accepted as meaning the offspring of the deceased. The next two passages in the paragraph offer a possible explanation of the use of the word "*Brahmini*." The concluding passage runs: "Such is the meaning of the passage, for else according to the preceding interpretation all the texts, which declare the equal right of the son and daughter to the mother's property in certain cases

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would be incengruous." The texts here referred to are those doalt with in the proceeding paragraphs of the section, and which lay down the general rule that the sons and unmarried daughters equally divide the property of the mother, and the passage seems to lay down that the paragraph provides in respect of *ayautuka stridhan* received from a father an exception to that rule, and nothing more.

The succeeding paragraphs 17 to 24 seem clearly to go back to paragraph 13 and to deal with the text referred to in that paragraph. They explain that the term "her issue" in the text of Narada refers to the issue of the mother and not of the daughters. S. 13, however, distinctly provides that the texts relate only to the (*yautuka*) wealth given at the nuptials because these passages contradict the text of Dovala cited in paragraph 6. That text runs: "A woman's property is common to her sons and unmarried daughters, when she is dead."

Paragraphs 22 and 23 go on to lay down the line of succession to the property of a woman received at her nuptials, and the passages following explain how the order of succession is modified by the form adopted at the time of marriage.

For the appellants it is argued that paragraph 22 resumes the discussion of the succession to *yautuka stridhan* from paragraph 13 and that the intervening paragraph 16 alone deals with the succession to *pitridatta ayautuka stridhan*, and provides in the case of such property the exception to the general rule of succession that the unmarried daughters succeed in preference to the sons, and not jointly with them. This view is supported by the order of succession to *pitridatta ayautuka stridhan*, which is given in the synopsis of Srikrishna at the end of Chapter IV.

For the respondents it is argued that the word "*kanya*" in paragraph 16 is used generally to include all daughters; that therefore all daughters, whether unmarried, married, or widowed, are preferred to sons, and that is the view, which Srikrishna himself adopted in his *Dayakrama Sangraha*. Further, it is argued that the discussion in the subsequent

paragraphs of the words "her issue" would be unnecessary, if the expression "*Brahmini kanya*" did not cover married as well as unmarried daughters of the deceased. This contention does not, however, seem to be sustainable for the discussion in paragraphs 17 to 21 seems clearly to refer to the meaning of the words "her issue" as used in the text of Narada in paragraph 13.

It is not easy to determine the exact meaning of the text of the Dayabhaga, but the synopsis in which Srikrishna gives the order of succession shows clearly enough that he then interpreted it to mean that the unmarried daughters alone were preferred to sons in the succession to property given to a woman by her father not at her nuptials.

The next authority we come to is the Dayakrama Sangraha of Srikrishna. This is described in the preface as containing a good compendium of the law of Inheritance according to Jimutavahana's text as expounded in his commentary on the Dayabhaga. Chapter II deals with the order of succession to the peculiar property of a woman. S. 1 deals with the succession to the property of a maiden, s. 2 defines the peculiar property of a married woman; s. 3 deals with the succession to the separate property of a woman, when received at her nuptials, and s. 4 with the separate property not received at her nuptials. Then comes s. 5, which is important for the purposes of this case, and which deals with the succession to the separate property of a woman, when given to her by her father. Paragraphs 1, 2 and 3 deal with the order of succession. It has been pointed out to us that in the original the text is not divided into paragraphs, and that the paragraphs 1 and 2 and the first half of paragraph 3 down to "received at nuptials" form one paragraph. These passages, as well as the remaining part of paragraph 3 and paragraph 4, have been interpreted by the Subordinate Judge to mean that the order of succession to *ayautuka stridhan* is the same as that of *yautuka stridhan* given by the father, and is first the maiden daughter, then the married daughters, who have, or are likely

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to have, male issue, then the barren and widowed daughters, and on these failing, the sons and the rest. This construction is supported by the learned pleader for the respondents, who argues that the latter portion of paragraph 3 and paragraph 4 merely confirms the preceding paragraphs.

The meaning and effect of the four paragraphs have been considered by a Bench of this Court in the case of *Ram Gopal Bhattacharjee v. Narain Chandra Bandopadhyaya* (1). In that judgment the learned Judges express the opinion that the first paragraph of s. 5 should be taken to apply to the separate property of a woman given to her by her father both at her nuptials and at any time other than her nuptials, that is to say, to both *yautuka* and *ayautuka stridhan*, that ss. 2 and 3 should be taken to lay down the rule of succession in the case of *yautuka stridhan*, and paragraph 4 the right of succession applicable to *ayautuka stridhan*. They take the words "as in the case of property received at nuptials" in the 3rd paragraph to mean that it refers to such property only. The learned Judges also point out that, if this view be accepted, there will be no difference between the line of succession as laid down by Srikrishna in his synopsis to Chapter IV of the *Dayabhaga* and in the section of his *Dayakrama Sangraha*, with which we have been dealing. The learned pleader for the respondents contends that it is impossible to reconcile the views expressed in the two works, and that the line of succession given in the *Dayakrama Sangraha* should be accepted as correct.

One thing is, however, clear that, if the two opinions be held to be irreconcilable, the authority of the learned commentator is considerably weakened.

The next authority is the *Dayatatwa* by Raghunandan. Chapter X deals with the succession to woman's property. The first paragraph lays down the general rule that a woman's property is common to her sons and maiden daughters, when she is dead, and the succeeding paragraphs up to paragraph

(1) (1905) I. L. R. 33 Cal. 315; 10 C. W. N. 510; 3 C. L. J. 15.

10 deal with the succession on failure of sons and married daughters. Paragraph 12 deals with property received by a woman at the time of her marriage and prefers the married daughters to the sons. Paragraph 16 deals with *ayautuka stridhan* received from the father and quotes the passage from Manu relied on in the Dayahhaga, Chap. IV., s. 2, para. 16. Paragraph 17 provides that on default of these the sons succeeds, quoting in support the authority of Manu. The question then arises whether this applies to *ayautuka stridhan* or whether it follows in natural order of sequence paragraph 13, which deals with *yautuka stridhan*. The Suhordinate Judge has accepted the former alternative, but here, as in the other authorities, the succession to *ayautuka stridhan* is introduced seemingly in parenthesis, and it seems open to doubt, whether paragraph 17 really refers to it or to *yautuka*. Paragraph 18 points out that similarly also other texts declaring the succession of daughters previous to that of sons refer to this description of woman's property. This description may refer to "property given by the parents" as mentioned in paragraph 11 or to nuptial presents as mentioned in paragraph 13.

Mr. Maenaghten, in his Principles and Precedents of Hindu Law, published in 1829 in Vol. I, pp. 39 and 40, follows, in the case of *ayautuka stridhan* received from the father, the line of succession given by Srikrishna in his synopsis at the end of Chapter IV of the Dayahhaga

Sir Thomas Strange, in his Elements of Hindu Law, Vol. I, p. 247, notices the intricacy with which the succession to woman's property is regulated, and in the Appendix, Vol. II, p. 493, extracts the order of succession as given in the synopsis of Srikrishna to Chapter IV of the Dayabhaga, and states that it is the settled order of succession to the separate property of a woman.

Neither of these learned authors could claim to be, as those previously mentioned, expounders of the text of the Hindu law, but both had large experience in the Courts of law, and presumably were well aware of the authorities that were accepted in them.

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The next authority is the Vayavastha Darpana of Shama Churn Sircar. In his first edition, published in 1859, he adopts the exposition of the law of succession to the property of a woman received from her father at any time other than her nuptials given by Srikrishna in his synopsis attached to Chapter IV of the Dayabhaga in preference to that given in the Dayakrama Sangraha, because, being consonant with the Dayabhaga, it is respected above the Dayakrama Sangraha. He also accepts the view that in the passage in Chapter IV, s. 11, para. 16 of the Dayabhaga "*kanya*" means "maiden daughter."

In the second edition of the Vayavastha Darpana published apparently in 1867 (see pp. 718-719), the learned author accepts the order of succession to the property of a woman given to her by her father at any time other than at her nuptials, given in Srikrishna's commentary on the Dayabhaga. In a remark, which follows the portion of the text dealing with this subject, the author notices that in the Dayakrama Sangraha Srikrishna lays down that succession to the property given by a father to his daughter, whether at the time of her marriage or at any other time, is regulated according to the principles applicable to the property received at nuptials and he expresses the opinion that this view is supported by the note of Jimutavahana in the Dayabhaga on the passage in Manu. But he goes on to say "the order of succession as given in the commentary on the Dayabhaga seems to be more consistent with reason, for in the succession to this kind of *stridhan*, why should the son, who confers the greatest benefit on the mother, be postponed even to the widowed and barren daughters, (who confer no spiritual benefit on her), in the same way as in the succession to the *ayautaka* property, which descends to the daughters in preference to the son solely on account of certain texts of the sages and especially the text of Manu, Chapter III, v. 49. The text and note indicate the opinion of the learned author that in the line of succession sons should be preferred to daughters other than unmarried daughters.

In the edition of his work published in 1883 after his death, a different order of succession is adopted, and all daughters married and widowed are preferred to the sons.

Here, again, we have a learned commentator expressing diametrically different views at different times, a circumstance which goes to weaken confidence in him as an authority.

Among later commentators we find in the work on Hindu Law of Marriage and Stridhan by Dr. (now Sir) Gooroo Das Banerjee, that the learned author in the first edition remarks that the order given by Srikrishna's commentary on the Dayabhaga is "generally" accepted as correct, while in the later edition, p. 408, he qualifies it by saying it is accepted as correct by some authorities. The learned author points to the difference between the authorities on the point, and expresses no certain opinion himself.

Jogendro Smarta Siromoni, in his commentary on Hindu Law, published in 1885 at page 398, deals with *pitridatta stridhan*. He points out first that there is a special rule with regard to this class of property, that it goes in the first instance to the unmarried daughter alone. He notices that in the Dayakrama Sangraha Srikrishna has laid down that the course of succession to *pitridatta* is similar to that in the case of *ayautuka*, but he goes on to say that in Srikrishna's commentary on the Dayabhaga he has expressed a different opinion. He however notices that property given by the father before or after marriage must be regarded as *ayautuka*, and the course of succession to such property must be the same as in respect of any other *ayautuka*, except so far as the operation of the general rules is qualified by special texts, and he adds that there is no direct authority for saying that all daughters succeed to the *pitridatta* before the sons. The learned Subordinate Judge in dealing with this authority fails to notice that the opinion above expressed is clearly in favour of the view that the sons succeed to *pitridatta ayautuka stridhan* after the unmarried daughters. In commenting on the judgment of Mr. Justice Mitter in the case of *Jadoo Nath Sircar v. Bueunt*

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Coomar Roy Chowdhry (1), the learned author remarks that the conflict between *Srikrishna* in the *Dayakrama Sangraha* and his master in the *Dayabhaga* cannot be reconciled except by showing that the text of the *Dayabhaga* is capable of being interpreted in the manner *Srikrishna* has done.

Babu Gelap Chandra Sarkar Sastri in his work on Hindu Law notices the conflict between the *Dayakrama Sangraha* and *Srikrishna's* synopsis to Chapter IV of the *Dayabhaga* in respect of the line of succession to *ayautuka stridhan*, which is given by a father at any time other than the nuptials, and notices that the question is beset with considerable difficulty arising from apparent contradiction.

Mayne, in his work on Hindu Law and Usage, 7th ed., p. 900, s. 673, accepts the view that all the daughters are preferential heirs to the sons.

Taking next the decisions of the Courts, we find that in the case of *Gopal Chandra Pal v. Ram Chandra Pramanik* (2) this Court refused to follow the *Dayakrama Sangraha* in respect to the order in which a brother or a husband were entitled to succeed to movable property received by a woman from her father after her marriage, and relied in preference on the text of the *Dayabhaga* as being the paramount authority in the Bengal School.

In the case of *Ram Gopal Bhattacharjee v. Narain Chandra Bandopadhyaya* (3) to which reference has already been made, a similar view was accepted in respect of the mother's right to succeed to *anuradheya stridhan* of a childless woman in preference to her husband. The learned Judges in dealing with paragraph 16, s. 2, Chapter IV of the *Dayabhaga* expressed the opinion that, subject to the one variation made in that passage, "*yautuka* given by a father is inherited as other *yautuka*, and *ayautuka* given by the father is inherited as other *ayautuka*:" and they attempt to reconcile the paragraphs 1

(1) (1873) 19 W. R. 204; 11 B. L. R. 286.

(2) (1901) I. L. R. 28 Calc. 312.

(3) (1905) I. L. R. 33 Calc. 315; 10 C. W. N. 510; 3 C. L. J. 15.

to 4 of s. 5 of the Dayakrama Sangraha with this view in the manner already noticed in this judgment.

In the case of *Judoo Nath Sircar v. Bussunt Coomar Roy Chowdhry* (1) the exact words of the Dayakrama Sangraha have not been accepted and in preference an attempt has been made to reconcile them with the text of the Dayabhaga.

The result of a careful examination of the commentators and authorities on Hindu law and of the cases, which have come before the Courts, in which the question of the succession to the *pitridatta ayautuka stridhan* of a woman has been considered, does not at all go to support the opinion expressed in rather over-confident terms by the Subordinate Judge in the lower Appellate Court that the balance of authority is heavily in favour of the married daughters being preferred to the sons.

If we rely on the Dayabhaga itself, and the earliest interpretation put on it by Srikrishna in his synopsis, we must hold that the sons should be preferred in the line of succession to the married daughters. If we take the words of the text of the Dayabhaga, we find that it is only in two exceptional passages, and those of doubtful authenticity, that the word "*kanya*" is used by itself in the Dayabhaga to mean a daughter in the generic sense. When the author intends to convey that meaning, the word "*duhita*" is used. "*Kanya*" is used to mean "a bride at the time of nuptial" and "an unmarried damsel," and in fact the original meaning of the word appears to have been "a girl up to 10 years of age." According to the ordinary rule, unmarried daughters and sons succeed jointly to the separate property of their mother, and the question is whether in the passage of the Dayabhaga under consideration it was intended to give the unmarried daughters preference to the sons, or to give all the daughters preference to them. Certainly the use of the word "*kanya*" seems to go far to support the former conclusion.

To support the contention that the word "*kanya*" is used

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in the generic sense to include all daughters, the learned pleader for the respondents has relied on the passages in the *Dayakrama Sangraha* to which we have referred, and has argued that the learned Judges in the case of *Ram Gopal Bhattacharjee v. Narain Chandra Bandopadhyay* (1), have failed to reconcile the discrepancey between these passages and the synopsis in the *Dayabhaga*, which it is contended are irreconcilable.

The texts of the ancient authors do not however yield readily to those methods of construction which we are able to adopt in dealing with books of recent date. The style is often involved. No rules of punctuation are observed, and matters are introduced in parenthesis, both in passages and in sections of the works, without any apparent system or rule. One of the learned Judges, who was a party to the decision under consideration, is a Sanskrit scholar, who was able to seek elucidation of difficulties by reference to the original texts. Under these circumstances, it seems to me that we should hesitate before differing from the view expressed in that judgment. The *Dayakrama Sangraha* is supposed to have been written by Srikrishna after his synopsis to the *Dayabhaga*, but as to this there is no certainty. At all events, there is nothing in the *Dayakrama* to explain why the learned author had modified his previous opinion, and therefore there is every reason to attempt to reconcile the two expressions of opinion, if it be possible. If that can be done in the manner adopted by the learned Judges in the case under notice, all further difficulties will disappear.

If such reconciliation be impossible, then it seems that the credit to be attached to Srikrishna as an authority is much weakened.

The meaning of the text of the *Dayatattwa* of Raghunandan is far from being clear owing to the introduction 'in parenthesis' of the reference to *ayatuluka stridhan* given by the father.

Macnaghten and Strange both accept Srikrishna's synopsis

(1) (1905) I. L. R. 33 Cal. 315; 10 C. W. N. 510; 3 C. L. J. 15.

at the end of Chapter IV of the Dayabhaga as laying down the correct law.

Shama Churn Sircar in his Vynvastha Durpana wavers in opinion, and it is remarkable that, in the first and second editions, which were published during his lifetime and in which he follows Srikrishna's synopsis and accepts the meaning of "*kanya*" to be unmarried daughter, he gives reasons for his conclusions, while in the third edition, which was published after his death, no reasons whatever for his change of opinion, (if in fact the opinion expressed in that edition be his), are mentioned.

Jogendro Smarta Siromoni refuses to accept the view that all daughters should be preferred to sons. The other learned authors invite attention to the difficulty, which has arisen, in interpreting the passage in the Dayabhaga owing to subsequent contradiction, but do not assist us to elucidate it.

The decisions of the Courts, to which we have referred, indicate that where there is a difference between the Dayakrama Sangraha and the Dayabhaga, the former has been rejected and the Dayabhaga followed.

Taking the passage of the Dayabhaga as it stands, and giving due effect to the use of the word "*kanya*", and taking also into consideration the context and the fact that the earliest interpretation of the text was in favour of giving the sons preference to the married daughters in the succession to the *pitridatta ayautuka stridhan*, the reasonable conclusion appears to be that the intention of the Dayabhaga was to lay down a general law of succession to *ayautuka stridhan*, and to make an exception in the case of such property received from a father only to the extent that in the first instance the unmarried daughter is preferred to the son. I see no reason to differ from the view taken by the learned Judges in the case of *Ram Gopal Bhuttacharjee v. Narain Chandra Bandopadhyaya* (1) that the synopsis of Srikrishna to Chapter IV of the Daya-

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Taking the passage of the Dayabhaga as it stands, and giving due effect to the use of the word "*kanya*", and taking also into consideration the context and the fact that the earliest interpretation of the text was in favour of giving the sons preference to the married daughters in the succession to the *pitridatta ayautuka stridhan*, the reasonable conclusion appears to be that the intention of the Dayabhaga was to lay down a general law of succession to *ayautuka stridhan*, and to make an exception in the case of such property received from a father only to the extent that in the first instance the unmarried daughter is preferred to the son. I see no reason to differ from the view taken by the learned Judges in the case of *Ram Gopal Bhuttacharjee v. Narain Chandra Bandopadhyaya* (1) that the synopsis of Srikrishna to Chapter IV of the Daya-

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bhaga and the paragraphs in the Dayakrama Sangraha are capable of reconciliation.

I would, therefore, set aside the judgment and decree of the lower Appellate Court and decree the appeal and restore the judgment and decree of the Court of first instance with costs

As, however, my learned brother differs in opinion from me the case must be referred to the Hon'ble the Chief Justice for orders under s. 575 of the Code of Civil Procedure.

COXE J. In this case the sole point in issue is, whether sons succeed in preference to married daughters to property given to a woman by her father at a time other than the time of nuptials; and the decision of this question turns exclusively, or almost so, on the further question, whether the word "*kanya*" in paragraph 16, s. 2, Chapter 4 of the Dayabhaga refers exclusively to unmarried daughters or includes all daughters. It will be convenient to deal with the authorities in order, and the first that must necessarily be considered is the Dayabhaga itself. The Dayabhaga deals first with the succession to woman's property generally, and lays down that the property of a woman goes on her death, first to her son and unmarried daughter, and then to the married daughters. The author then deals with the *yautuka* property, which he apparently regards as exceptional, and lays down that it goes on the mother's death to the daughters. Then comes the text on which this controversy hinges (iv, ii, 16). The author quotes a text of Manu, which runs, "The wealth of a woman, which has been in any manner given to her by her father, let the Brahmini damsel (*kanya*) take, or let it belong to her offspring." And as I have said, the controversy arising in this case turns principally on the question whether the word "*kanya*" is intended to refer only to the unmarried or to all daughters.

There is no dispute that the term means "daughter." It is not suggested that any girl, who was not a daughter, could by any possibility succeed. But it is strenuously argued that the word ordinarily means a maiden daughter only, and is

only used to signify daughters in general, when used in conjunction with the word *putra* (son). Particular reference is made to the use of the word in the text of Devala, quoted in paragraph 6 of the same section of the Dayabhaga, which runs, "A woman's property is common to her sons and '*kanya*,' when she is dead, but if she leave no issue, her husband shall take it, etc." It is curious that, if the word "*kanya*" here refers only to unmarried daughters, there is no direct reference to unmarried daughters at all, though admittedly they succeed before the husband. But it is not disputed that the word "*kanya*" in this passage means unmarried daughters only.

At the same time, it cannot be denied that the word is occasionally used to signify daughters generally, and the sense in which it is used in this passage must in my opinion be gathered from the context. It has been argued that the paragraphs succeeding paragraph 16 deal with the question whether in the text of Manu quoted above, the words "her offspring" refer to the daughter's offspring or the offspring of the deceased mother. And it has been argued that the fact that this point has been thought worthy of serious discussion shows conclusively that the word "daughter" must include married daughters, for obviously an unmarried daughter could not, in the eye of the law, have any offspring at all and therefore, if only unmarried daughters were referred to, there could be no controversy or discussion as to what was meant by the words "her offspring." To this argument there could, in my opinion, be no answer, if the paragraphs really referred to the text of Manu before quoted. But if I understand the paragraphs aright, they refer to a text of Narada quoted in paragraph 13, and not to the text of Manu at all. Still the fact remains that the author of the Dayabhaga deals with the succession to *yautuka* property in paragraphs 13, 14 and 15. He then deals with this special subject of the succession to *pitridatta* property. He then devotes paragraphs 17 to 21 to a possible misconception that might arise with regard to the succession to *yautuka* property laid down in paragraph 13. And then

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he goes on dealing with the succession to *yautuka* property generally. Taking the whole arrangement of the section, with the parenthetical reference to the succession to *pitridatta* property in paragraph 16 embodied in the general discussion of the succession to *yautuka* property, it seems to me that the author of the Dayabhaga regarded *pitridatta* property as coming under the rules relating to *yautuka* property so far as daughters were concerned.

Ayautuka property goes first to the son and unmarried daughter, then to the other daughters. *Yautuka* goes first to the daughters and then to the sons. If really there were a third and entirely distinct order of succession to *pitridatta* property, it seems reasonable to suppose that in a work that is certainly not inattentive to detail, it would have been stated distinctly what it was.

It has been argued on behalf of the appellants that, if he intended that daughters as a class succeeded to *pitridatta* property, the author of the Dayabhaga would certainly have laid down their order of succession within the class. To me the fact that he has omitted to do so, and has merely stated the fact of the daughter's succession in a parenthesis embodied in the middle of the rules governing the devolution of *yautuka* property, in which the order of succession of daughters *inter se* is set out, seems to indicate that he did not regard the succession of the "*kanya*" to *pitridatta* property as any exception to the rule governing the succession to *yautuka* property. It must be remembered that the word "*kanya*" was not his own. He was quoting from the Code of Manu, which was in verse, and presumably subject to the laws of metre and style. He did not feel himself bound to assign any specific meaning at all to the word "*Brahmini*," and it may well be that he did not feel himself bound to attach a restricted meaning to the word "*kanya*." With reference to the words "or let it belong to her offspring" in the text under consideration it may be asked why a word signifying both male and female offspring should be used, if the text means that on failure of

daughters the property goes to the sons. It is clear, however, from the context that the word "offspring" cannot refer to all the children, but only to the children other than the "*kanya*." If therefore "*kanya*" means all the daughters, the word "offspring" must refer to the sons. If, on the contrary, the word "*kanya*" means unmarried daughter only, the text prescribes that in the absence of an unmarried daughter sons and married daughters inherit together, which is not suggested by any body. This consideration seems to me to support in some measure the view that the word "*kanya*" refers to all the daughters. I do not however lay any stress on this beyond saying that in my opinion the use of the word "offspring" is not inconsistent with the view that the term "*kanya*" refers to all the daughters.

Next comes the strongest authority on the side of the appellants, namely, the summary by Srikrishna, at the end of Chapter IV of the Dayabhaga, of the rules of succession prescribed in that chapter. This clearly lays down that in the case of *pitridatta* property not given at the time of marriage, the maiden daughter succeeds first, then the son, and then the other daughters.

It is argued, however, by the respondents that this authority has been destroyed by the fact that Srikrishna in his later work, "The Dayakrama Sangraha" (Chapter II, section 5) has laid down that the daughters succeed before the sons. It will be necessary to set out the first three paragraphs of the section in full. They run as follows —

"In regard to the wealth given by a father to a woman at the time of the wedding, or antecedent or subsequent to it a maiden daughter inherits in the first place.

"2 After her a married daughter, who has, and one who is likely to have, male issue, inherit together.

"3. Next the succession devolves on the barren and widowed daughters, and in default of all daughters, the son and the rest succeed as in the case of property received at nuptials; for a text of Manu declares,—"The wealth of a

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woman, which has in any manner been given to her by her father, let the Brahmini damsel take or let it belong to her off spring.”

It was held in *Ram Gopa Bhullatharjee v Narain Chandra Bandopadhyaya* (1), that though the first paragraph referred to both *yautuka* and *ayautuka pitridatta* property, the second and third could refer to *yautuka pitridatta* property only. This view was based principally on the words “as in the case of property received at nuptials,” and on the fact that, if the second and third paragraphs referred to *ayautuka* as well as *yautuka pitridatta* property, it would be impossible to reconcile the *Dayakrama Sangraha* with the same author’s synopsis of the *Dayabhaga*. It has been argued, however, before us that a consideration of the original text renders this view untenable. We are informed that the first two paragraphs and the third paragraph as far as the words “widowed daughters,” form one sentence prescribing that the maiden daughter is first entitled to succeed, then the married daughter, and then the widowed daughter; and ending with the word “entitled” which applies equally to all the preceding nominatives. An entirely new sentence then begins with the words “In default of all the daughters.” If this is so, and the fact has not been disputed before us, then although I have the greatest diffidence in dissenting from the view of the learned Judges in the case cited above, I find myself unable to understand how any distinction can be drawn between the first and the two following paragraphs in their relation to all kinds of *pitridatta* property. And it appears to me that the succeeding sentence—“In default of all daughters the son and the rest succeed as in the case of property received at nuptials; for a text of Manu declares—“The wealth of a woman, which has in any manner been given her by her father let the Brahmini damsel take,” implies that in the view of Srikrishna at the time he wrote the *Dayakrama Sangraha*, the term “Brahmini damsel” was in effect synonymous with

"all daughters." In paragraph 4, it is laid down that, whatever is given by the father "belongs first to the damsel and after her it goes to her offspring, her son." This paragraph is to my mind conclusive that Srikrishna at the time he wrote the Dayakarama Sangraha regarded the term "*kanya*," as including married daughters, since otherwise he could not have referred to their sons.

Next comes the Dayatatwa of Raghunandan. Chapter X of this work begins by dealing with succession to *stridhan* generally. Then in paragraphs 12 to 15 the author deals with succession of *yautuka*. Paragraph 16 deals with the text of Manu that *pitridatta* property goes to the Brahmani damsel. Paragraphs 17 and 18 run as follows :—

"17. On default of these the son succeeds; since Manu says 'on default of daughters the inheritance goes to sons.'"

"18. Similarly also other texts declaring the succession of daughters previous to that of sons refer to this description of woman's property."

Then paragraph 19 begins, "On failure of sons and the others, a woman's nuptial presents go to the husband."

It is argued on behalf of the appellant that paragraph 16 is a parenthesis and that, at the end of it the author resumes the consideration of the succession to *yautuka* property. In this view, the words "on default of these" at the beginning of paragraph 17 mean "on default of the daughters mentioned in paragraph 13." On the other hand, it is argued on behalf of the respondents that the words mean "on default of the Brahmani damsels mentioned in the preceding paragraph." It seems to me that both views are tenable and that it would be unsafe to build any firm conclusion on this passage. I may say, however, that the repetition of the words "nuptial presents" in paragraph 19 tends in a small measure to show that the parenthesis about the *pitridatta* ends, and the discussion of *yautuka* property is resumed at that point.

The authority next quoted is Jagannath's or Colebrook's Digest. It is difficult to base any conclusion on this work as

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it quotes both the text of Devala, to the effect that the son and maiden daughter together, and that of Katyayana, to the effect that the daughters succeed, and draws no clear distinction between *yautuka* and *ayautuka* property. But in quoting the text of Manu (paragraph cccxcv) the author construes it as laying down that the property of a childless wife shall go to the daughter of a Brahman co-wife, or to the issue of that daughter. So that it is clear that the author did not regard the term "*kanya*" as necessarily confined to an unmarried girl.

Subsequent commentators may be briefly referred to, although the case must be decided on the view that is taken of the earlier authorities. Macnaghten is wholly in favour of the appellant. Strange is claimed as being in his favour, but all that appears in that work is a reprint of Srikrishna's synopsis at the end of Chapter IV of the Dayabhaga. Jogendra Nath Bhattacharjya is in favour of the appellant's contention, but his views are in my opinion weakened by the distinction which he draws between the first and subsequent paragraphs of section 5 of the Dayakrama Sangraha. Golap Chandra Sarkar seems to have been unable to make up his mind on the point, and a still more remarkable instance of this indecision may be found in the work of Shama Charan Sarkar. In the first edition of the work of that learned author he seems to have been wholly in favor of the view urged by the appellant. In the second (section 464), he admitted that the Dayabhaga furnished full authority for the contrary view, but thought that reason required the postponement of the married daughters to the sons. But in the last edition of his work, published some months after his death; he went wholly round to the view, for which the respondents now contend. On the other hand, Mayne is wholly opposed to the view taken by the appellant.

I attach a good deal of importance to the comments in the second edition of Shama Charan Sarkar's *Vayavastha Darpan* and those in Mr. Justice Banerjee's work on *stridhan*. The first author gives the succession as laid down in Srikrishna's

Synopsis at the end of Chapter IV of the Dayahhaga. That was the order of succession, which he thought was right. He defends it as based on reason. But he admits, and, as it seems to me, reluctantly admits, that Srikrishna in the Dayakrama Sangraha lays down that succession to all *pitridatta* property is regulated according to the principles applicable to *yautuka* property, and then he goes on to say; "The above is not the solitary opinion of Srikrishna alone but also of Jimutavahan, as is evident from the following note." The note is a quotation of the paragraph 16 which has already been set out in full. Now, if the word *kanya* must necessarily mean an unmarried daughter, I cannot understand how Shama Charan Sarkar can have felt himself forced to admit that paragraph 16 was opposed to the view, which he was defending. For if the word "*kanya*" as we are now told, would necessarily convey to all Sanskrit scholars the signification "unmarried daughter," it is clear that the commentator must have seen at once that the Dayahhaga was not opposed to the synopsis and did not support the view that the order of succession to all *pitridatta* property was the same as that of succession to *yautuka*. And the fact that this evidently did not occur to him indicates strongly to my mind that the restriction of the meaning of the word "*kanya*" to unmarried daughters is untenable.

The same considerations apply, though in a less degree, to Mr. Justice Bancroft's observations on page 408 of his work on Marriago and Stridhan (second edition). Though he does not express any very decided opinion he seems to accept the order laid down in Srikrishna's Synopsis. But he observed that according to the Dayakrama Sangraha the order of succession was the same as for *yautuka* and that this "seems to be in accordance with the opinion of Jimutavahana and Raghunandan" And clearly, if the word "*kanya*" had conveyed to the learned commentator's mind the meaning of "unmarried daughter" only, he could have had no reason whatever for saying that it was the opinion of Jimutavahana, that the

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order of succession for all *pitriddatta* property was the same as that for *yautuka*.

We have been referred to two cases, *Jadoo Nath Sircar v. Bussunt Coomar Roy Chowdhry* (1) and *Gopal Chandra Pal v. Ram Chandra Pramanik* (2). But all that was held in the first of these cases was that the words "sons and the rest" in the *Dayakrama Sangraha* did not include collateral heirs, and this finding does not seem to me to have any bearing on the present case. The second case also has no real application to this case.

I think that the appellants have failed to show that the Subordinate Judge is wrong. The only clear authorities on the point are the two diametrically opposed statements of Srikrishna. If either of these is to be preferred, it should, I think, be the latest, namely, the *Dayakrama Sangraha*. Otherwise the decision of the case must turn on the question whether the word "*kanya*" in the *Dayabhaga* includes married daughters." The Subordinate Judge is of opinion that it does include them. The arrangement of that portion of the *Dayabhaga* indicates that the author intended to include them. The interpretation of Manu's text given in Jagannath's Digest, and in the *Dayakrama Sangraha*, indicate that the term was understood as including married daughters. Among the later commentators Bahu Gooroo Das Banerjee and Shama Charan Sarkar, in the second edition of his work, while accepting the order of succession laid down in the synopsis, were at the same time of opinion that that order was opposed to the *Dayabhaga*, a view, which necessarily implies that they thought that the term "*kanya*" included married daughter. Against these authorities there are the clear opinions of Macnaghton and Jogendra Nath Bhattacharjee, which in their turn are opposed to that of Mayne. I find it impossible to hold on these authorities that the term "*kanya*" could not have been intended to include married daughters. I think

(1) (1873) 19 W. R. 264.

(2) (1901) I. L. R. 28 Cal. 331.

that it does include them, and, if this view is correct, these appeals must necessarily fail.

Accordingly I would dismiss these appeals, but I agree that they should be referred to another Judge or Judges under s. 575 of the Civil Procedure Code

[Owing to this difference of opinion, the case was referred to a third Judge, Mitra J.]

Mr. B. Chuckerbutty (*Mr. B. K. Lahiri and Babu Mohini Mohun Chuckerbutty with him*) for the appellant.

Dr. Priya Nath Sen (*Babu Rajendra Chandra Guha or Babu Akhilbanthu Guha with him*) for the respondents.

MITRA J. The decision of the question of Hindu law raised in these appeals depends on the interpretation of Chapter IV, s. 2, para. 16 of the *Dayabhaga* of *Jimutavahana*, the paramount authority in the Bengal School. Other authorities may be followed, if there be any ambiguity in *Jimutavahana's* text. *Srikrishna* and *Raghunandana* undoubtedly deserve the greatest respect, but their opinions must yield to the authority of their great master, *Jimutavahana*, himself.

Chapter IV, s. 2, para. 16 of the *Dayabhaga* of *Jimutavahana* is as follows in *Colebrooke's* translation — "As for a passage of Manu, 'The wealth of a woman, which has been in any manner given to her by her father, let the Brahmini damsel take or let it belong to her offspring' since the text specifies 'given by her father' the meaning must be, that property, which was given to her by her father, even at any other time besides that of the nuptials, shall belong exclusively to her daughter, etc." The text of Manu referred to in the paragraph is this in original :—

स्त्रियन्तु यद्वैदित्त्वं दत्तं दत्तं कथञ्चन ॥
 ब्राह्मणी तद्वैत् कन्या मदपत्यस्य वा भवेत् ॥

Chap. IX, v. 198.

The word "damsel" in the translation by *Colebrooke* represents the word "कन्या" in the original text. In *Jimutavahana's* commentary on it in paragraph 16, he also uses the

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word “कन्यायाः”. In the next sentence in that paragraph he uses the words ‘सपत्नी दुहितुः ब्राह्मणी वन्याः’. In this last sentence, the word ‘दुहितुः’ is evidently used in contradistinction to the word ‘कन्याः’.

The question then arises.—In what sense has the word “कन्या” been used by Manu and Jimutavahana? The arguments before me, as well as these before my learned colleagues, Brett and Coxe, JJ., related principally to the meaning of the word ‘कन्या’ and the sense in which it was used by Jimutavahana. Does it mean an unmarried daughter, or, daughters generally?

The word “कन्या” primarily means a maiden daughter, a virgin “कुमारी” (kumari). That is the interpretation of the word given by the celebrated lexicographers Amar Singh and Hem Chandra. In the *Medini* also, the first synonym of “कन्या” is “कुमारी” (maiden daughter). The same meaning is given in the *Sardakalpadruma* by Rajah Sir Radha Kanta Deb Bahadur, and all the later lexicographers. Professor H. H. Wilson in his Dictionary also gives the same meaning: “A maid, a virgin, a girl of nine or ten years of age.” Later writers have occasionally used the word to mean “a woman” “नारी”—from the particular to the general. But that is not the meaning of the word as used in the *Smritis*. To illustrate the primary meaning of the word “कन्या” virgin, the learned author of the *Sanlakalpadruma* has cited a significant passage from the *Vanaparva* in the *Mahabharata*, showing the root and inflexion of the word and its meaning *kumari*,—“कुमारी.” He gives the secondary meaning “woman” (नारी), following the earlier lexicographers. Sir Greaves Haughton in his dictionary confines the meaning to a “maid, a virgin, a young woman.” In fact there can be no doubt as to the meaning of the word as used in earlier Sanskrit literature and law. The *genus* (woman) for the *species* (virgin) is of later use.

I have not been able to find the word used in its wider sense any where in Manu. The word “दुहिता” means daughter, married, unmarried or widow. All female children are

daughters "दुहितृ". The word included in its significance, "कन्या", and the lexicographers, I have referred to, are unanimous in this respect. Amar Singh, Hem Chandra as well as the *Medini*, also give the wider meaning of the word "कन्या", but they do not give the synonym to be "दुहितृ"; they use the word "woman" (नारी). When Jimutavahana uses the words "सपत्नी दुहिता ब्राह्मणी कन्या" in paragraph 16, he must have used the word "दुहितृ" in its appropriate sense of daughter and the word "कन्या" as included in the genus "दुहितृ." The word "कन्या" occurs also in paragraphs 6 and 7 of the same chapter and section. In paragraph 6, the text of Devala is cited—"सामान्यं पुत्रकन्यानां सतीया स्त्रीधनं स्त्रियाम्" and in paragraph 7 the word is interpreted to mean, as it must, "कुमारी." In both the paragraphs Colebrooke's translation of the words is "unmarried daughter." I am not disposed to come to the conclusion that the same word was used by Manu and Jimutavahana in an unusual sense in Chapter IX, v. 198 and paragraph 16, respectively. Such use would be inconsistent with its use in other parts of their great works.

Of the commentators on Manu's text, Kulluka carries the greatest weight. He seems to be of opinion that unmarried daughter first succeeds and, on her default, the sons of the deceased. He lays down distinctly that in the presence of both an unmarried daughter and sons, the former should be preferred and the sons follow the maiden daughter. This seems to be also the opinion of Manu's commentators, Raghavananda, Nandan and Ram Chandra, but Sarvajna Narayan may appear to be of a different opinion. The latter says "कन्यति दुहितृ मातृपरम्," i.e., the word *kanya* is used for daughters generally. But Sarvajna Narayan's authority has never been recognised in Bengal as superior to Kulluka's and the sentence itself is very vague.

The commentators of Dayabhaga, Srinatha, Ram Chandra, Mobeswara, Achyutananda, Raghunandana and Srikrishna, interpreted the word "कन्या" in the text as having its ordinary meaning of unmarried daughter. Srikrishna is abundantly

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clear in his commentary as has been pointed out by Brett and Coxo, JJ. Srikrishna and Raghunandana subsequently laid down in their respective treatises a different rule of succession, as if the word “*कन्या*” might mean daughters generally. In a conflict of authorities, however, Jimutavahana must be preferred. The later opinions of Srikrishna and Raghunandana, which are not based on the text of the Dayabhaga, ought not to be followed by the Courts in Bengal.

Macnaghten (Principles of Hindu Law, pp. 39-40), Strange (Vol. I, p. 251 and Vol. II, p. 403), Shyama Charan Vyavastha Darpana, p. 806, 1st Edition; pp. 717-8, 2nd Edition) and Elhorling have followed Srikrishna's commentary on the Dayabhaga and not his individual opinion as given in the Dayakrama Sangraha. The order of succession—maiden daughter, son and other daughters—was accepted by all Anglo-Indian text writers, until a cloud was thrown in the third edition of Shyama Charan's Vyavastha Darpana published after his death. Sir Gooroo Dass Banerjee in his learned work on the Hindu Law of Marriage and Stridhan (p. 408, 2nd Edition) seems to be of opinion that Srikrishna did not follow Jimutavahana as regards succession to *pitridatta stridhana*. Raghunandana in his *Dayatatwa* did not also follow the Dayabhaga.

I am of opinion that we should follow the Dayabhaga and not Srikrishna and Raghunandana, when it is evident that the latter have not followed their master in giving preference to daughters generally. I am confirmed in my view by what Rampini and Mookerjee JJ. have said in *Ram Gopal Bhattacharjee v. Narain Chandra Bandopadhyaya* (1). I agree, therefore, with Brett J.

The result is that the appeals will be decreed with costs in all the Courts.

Appeals allowed.

(1) (1905) I. L. R. 33 Calc. 315; 10 C. W. N. 510; 3 C. L. J. 15.
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APPELLATE CIVIL.

Before Mr. Justice Casperaz and Mr. Justice Coxe.

KARMA URAON

v.

BARAIK DEBI DAYAL SINGH.*

1908

Nov. 20.

Chota Nagpore Landlord and Tenant Procedure Act (Bengal Act I of 1879), as amended by Bengal Act V of 1903, ss. 44A, 62, 66, 67 and 77—Previous suit for rent, struck off under section 62—Whether subsequent suit within six months maintainable.

Held by Casperaz J. Section 62 of the Chota Nagpore Landlord and Tenant Procedure Act is not controlled by section 44A of the said Act. When a rent suit is dismissed under the first clause of section 77, read with section 62, of the Act, another suit for the same rent is maintainable within the period of six months.

Held by Coxe J., that such a suit is not maintainable by virtue of section 44A of the Act.

SECOND APPEALS by the defendants, Karma Uraon and others.

These appeals arose out of two rent suits brought by the plaintiff for recovery of arrears of rent against the defendants under the Chota Nagpore Landlord and Tenant Procedure Act. It appeared that the 18th of May 1906 was fixed for the hearing of the said suits for rent. On that day the plaintiff being absent, the Deputy Collector struck off the suits under s. 62 of the said Act. The plaintiff on the same day applied for the restoration of the suits, but the application was rejected. He then in June 1906 instituted fresh suits for rent.

Defence *inter alia* was that the suits could not proceed, inasmuch as they had been instituted within six months of the previous suits in contravention of the provisions of s. 44A of Bengal Act I of 1879.

The Court of first instance having held that the suits were barred by the provisions of section 44A of the Act, dismissed

*Appeals from Appellate Orders Nos. 228 and 238 of 1907, against the order of W. H. Vincent, Judicial Commissioner of Chota Nagpur, dated April 9, 1907, reversing the order of Moulvi Mahomed Hamid, Deputy Collector of Ranchi, dated Nov. 16, 1906.

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the suits. On appeal the learned Judicial Commissioner reversed the decision of the first Court.

Against this decision the defendants appealed to the High Court.

Babu Jogesh Chandra Dey, for the appellant. The suits are barred by s. 44 A, which was added by the amending Act (V of 1903). Section 62 of the Act is controlled by s. 44 A. The words "shall not institute another suit . . . recovery of any rent" in that section are wide enough to include cases falling under section 62. The order of the 18th May was really an order under the last part of section 77, as plaintiff admitted that he was present. The plaintiff should have pursued the remedies prescribed in sections 66 and 67, and by way of review. At any rate, the suit for rent of 1962 could not be maintained.

Babu Nalini Ranjan Chatterjee, for the respondent. Section 44A does not apply to a case like the present. The suit was struck off. The parties are therefore restored to their original position. In any case section 62 controls section 44 A. It comes after section 44A, and the only bar imposed is the bar of limitation. Section 62 was left untouched; it was not made subject to the provisions of section 44A, when the latter section was added. The order "struck off" passed on the 18th of May was the correct order. The Court did not accept the plaintiff's statement that he was present.

Babu Jogesh Chandra Dey, in reply.

Cur. adv. vult.

CASPERSZ J. In these second appeals by the defendants the substantial question raised is whether the plaintiff's suits to recover arrears of rent for the Samvat years 1960, 1961, 1962 should have been dismissed as being in contravention of the provisions of section 44A of the Chota Nagpur Landlord and Tenant Procedure Act, 1879. Section 44A, which was added by Bengal Act V of 1903, runs thus:—"Where a landlord has instituted a suit, or applied for a certificate

under section 125 against a raiyat or a Mundari Khunt-kattidar for the recovery of any rent of his tenancy, the landlord shall not institute another suit or apply for another such certificate against him for the recovery of any rent of that tenancy until after six months from the date of the institution or making of the previous suit or application."

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It appears that the plaintiff in March 1906 sued for the rents of 1959 to 1961, and alleged that some rent for 1962 had been deposited by the defendants. Issues were framed, and the 18th May 1906 was fixed for hearing. On that day the Deputy Collector recorded the order. "Plaintiff absent, struck off, section 62 C. N. T. A." The same day the plaintiff applied for restoration and asserted that he and the defendants had been present at the time of hearing, but the Deputy Collector declined to accede to the application. The plaintiff, then, in June 1906, without waiting for the expiration of the period of six months mentioned in section 44A, instituted the fresh suits giving rise to the present appeals. Thereupon, the Deputy Collector held the suits to be barred by the provisions of the section, but on appeal the Judicial Commissioner has held that the suits were not barred.

The contentions raised by the learned vakil for the appellant defendants are these :—

(1) That the second suits were barred by section 44A of the Act. (2) That the order of the 18th May 1906, under section 62, was in error, and that it was in reality an order under the second clause of section 77. (3) That the plaintiff should have pursued his other remedies under sections 66, 67 of the Act and by way of review. (4) That at any rate, the fresh suits for the arrears of 1962 were incompetent.

There is no substance in the second, third and fourth contention. The second clause of section 77 provides that—"If on any such day, one only of the parties appears, the issue may be tried and determined in the absence of the other party, upon such proof as may be then before the Court." But no issue was tried and determined by the Deputy Collector on the 18th May 1906; the orders striking off the suits were appro-

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privately passed under the first clause of section 77 read with section 62. Consequently, the only remedy open to the plaintiff was to proceed by way of fresh suits, and if those suits were maintainable, he could properly include in his claim all arrears of rent then accrued due.

The only substantial question, therefore, is that embodied in the first contention, and it is narrowed to this. Whether section 62 is controlled by section 44A. I think not.

Section 62 provides that, "If on the day fixed by the summons or proclamation for the appearance of the defendant, or on any subsequent day to which the hearing of the case may be postponed prior to the recording of an issue for trial as hereinafter provided, neither of the parties appear in person or by an agent, the case shall be struck off, with liberty to the plaintiff to bring a fresh suit, unless precluded by the provisions for the limitation of suits contained in this Act."

The plaintiff was at liberty, on the 18th May 1906, in terms of section 62, to bring fresh suits, unless precluded by the provisions for the limitation of suits contained in this Act. Those provisions are contained in sections 42, 45 and not, in my opinion, in section 44A. The period of limitation means the period during which action may be taken. Section 44A refers to a period during which action cannot be taken, and such a restrictive section is not covered by the general rule laid down by section 4 of the Limitation Act. In my opinion, section 44A restricts the Court's jurisdiction rather than the plaintiff's right of suit; the latter exists though it is in abeyance for six months.

Section 44A must also be construed strictly, that is, in favour of the plaintiff, because it encroached on his ordinary right to sue for arrears of rent. It may be assumed that the Legislature is acquainted with the actual state of the law. When Bengal Act V of 1903 added section 44A to Bengal Act I of 1879 the provisions of section 62 were left untouched. The Legislature did not insert, nor can I insert in section 44A the words "notwithstanding anything contained in section 2." The plain meaning of section 44A is that, when a land-

lord has instituted a suit for the recovery of any rent, he shall not institute another suit for the recovery of any rent subsequently accrued due until after six months from the date of the institution of the first suit. For example, if a tenant pays his annual rent in 12 or 4 instalments, the landlord cannot sue him every month or even every quarter; he must wait for at least six months. The words "any rent" which occur twice in section 44 A must be literally interpreted to refer, respectively, to any rent covered by the previous suit and any rent covered by the second suit and, *ex natura rei* the subject matter of the respective suits must be different, otherwise the second suit would not be necessary or maintainable. It is only in the case of a fresh suit, which the plaintiff is permitted by section 62 to bring, that the rent arrears claimed may be the same as in the suit struck off. The words "struck off" mean that the suit has, and never had, any existence, they imply that the suit is withdrawn as in section 373 of the Civil Procedure Code, and in this connection, may be cited the analogous section (147) of the Bengal Tenancy Act. See also *Varajlal Bhaishankar Selat v. Shomeshwar* (1).

The appeals must therefore fail and are dismissed with costs

COXE J. The only question that arises in this case is whether, when a rent suit is dismissed under section 62, or the first clause of section 77 of Bengal Act I of 1879, another suit can be instituted for the same rent within the period of six months. It is conceded that, if the first suit is dismissed under any other section, the second suit will not lie.

I am inclined to agree that section 44A is not a provision for the limitation of suits "within the meaning of section 62." Of course, if the law requires a suit to be brought after one specified date and before another date, both dates are really limits of the period within which the suit may be instituted; and a provision of law, which fixes the first date, really limits

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the suit just as much as the provision that fixes the second date. But the word "limitation" has acquired by custom a technical meaning, and I have little doubt that the Legislative authorities in framing section 62 intended only to refer to the latest date by which a suit might be instituted.

But it appears to me that the terms of section 44A taken in their ordinary meaning bar this suit. The words are "when a landlord has instituted a suit for the recovery of any rent * * * he shall not institute another suit for the recovery of any rent." Here it cannot be denied that the plaintiff did institute a suit for rent in March 1906, and did institute another suit for rent in June 1906. It has been argued that the effect of striking off a suit under section 62 is to restore the parties to their original positions as if such a suit had never been instituted. But to me it seems impossible to say in such a case that the first suit has never been instituted at all. And that the second suit is a new suit and not a continuation of the first suit is clear from the provision of limitation.

An Act ought to be construed so as to give as far as possible their full meaning to all its provisions. Here, if section 44A is construed against the landlord, it does not really conflict with section 62. The landlord's right of suit established by section 62, is not abolished by being kept in abeyance for six months. On the other hand, if section 44A is construed against the tenant, it seems to me that so far as regards suits of this nature, the plain words of the section are over-ridden, as the landlord, having instituted a suit for rent, is again allowed to bring another suit for rent.

In this suit the landlord sues both for the rent claimed in the former suit and for the rent of subsequent years. Indeed he must do so on pain of losing the latter rent altogether, *Taruck Chunder Mookerjee v. Panchu Mohini Debya* (1). But, unless the effect of an order under section 62 is an entire obliteration of the suit altogether, which I do not consider

admissible, it would seem that the suit at any rate for the rent of the subsequent year must be barred by section 44A.

The learned Judicial Commissioner has laid some stress on the point that section 44A is intended to save tenants from being harassed, and that, if a case is struck off under section 62, the defendant cannot be said to be harassed at all. But this observation hardly applies to the first of the present cases, in which issues were framed and the defendant must therefore have been forced to attend at some time or other in the course of the proceedings.

Finally there is the analogy of section 147 of the Bengal Tenancy Act, 1885. That section (which deals with precisely the same matter as section 44A now under consideration) though made specifically subject to section 373 of the Civil Procedure Code is not made subject to section 99. The natural inference is that the Legislature did not intend suits revived under section 99 to be free from the restrictions of section 147. And, if this was the intention of the Legislature in 1885, it would seem probable that the same intention would prevail when section 44A was enacted long afterwards to deal with an exactly similar matter.

Accordingly, I think that the suit is barred by section 44A, but as the landlord, from the point of view of justice and common sense, is certainly entitled to succeed, I do not desire to insist on the point of law, and I agree to the appeals being dismissed under section 575 of the Civil Procedure Code and not referred to another Judge.

Appeals dismissed.

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APPELLATE CIVIL.

Before Mr. Justice Caspersz and Mr. Justice Coxe.

BEPIN BEHARY SHAHA

v.

MOKUNDA LAL GHOSH.*

1908

Nov. 18.

Transfer of Property Act (IV of 1882) s. 93—Right to redeem, after the time allowed—Court accepting money before the order absolute—Such acceptance, effect of.

A person, who does not deposit the redemption money within the time allowed, can redeem afterwards, before a final order is made under section 93 of the Transfer of Property Act.

APPEAL by the plaintiff (opposite party), Bepin Behary Shaha.

A decree was passed by the Subordinate Judge of Suri in a contested suit, in which the plaintiff sued to enforce his mortgage on certain property by sale, as also to redeem certain prior encumbrances, on the 31st May 1906, allowing the plaintiff to redeem the prior mortgages within six months from the date of the decree. The defendants, who were the prior mortgagees, appealed against the said decree, and the appeal was dismissed. On the 16th April 1907, the plaintiff deposited the money due under the prior mortgages. On the 14th May 1907 the Court recorded the following order:—

"The plaintiff has deposited the money due to the 1st and 2nd mortgagees as directed in the decree. He now prays that the mortgaged properties be sold free of the prior charges for recovery of the money due to the plaintiff on account of his own mortgage money together with the amounts deposited by him to redeem the prior charges. The pleader of the other parties has declined to appear. I accordingly order that the prior charges of defendants 2, 3 and 4 be hereby declared redeemed and that the mortgaged properties be free of the said mortgages as prayed for."

The plaintiff then applied to make the decree absolute and a notice was issued upon the defendants to shew cause on the 12th July 1907, why the decree should not be made absolute.

* Appeal from Appellate Order No. 70 of 1908, against the order of K. N. Roy, District Judge of Beerbhoom, dated Nov. 25, 1907, reversing the order of Umesh Chandra Sen, Subordinate Judge of Beerbhoom, dated July 27, 1907.

In the meantime, on the 14th June 1907 the defendants Nos. 3 and 4 applied for reconsideration of the order of the 14th May 1907. The plaintiff opposed the application on the grounds that the order for redemption having been once passed could not be set aside on this petition and that he was entitled to deposit the decretal amount within six months from the date of the final decree, that is, the date of the decree of the Appellate Court. The learned Subordinate Judge gave effect to these objections and rejected the petition for reconsideration by the defendants on the 27th July 1907. Against this order the defendants (objectors) appealed to the learned District Judge, who set aside the decision of the Court of first instance.

The plaintiff (opposite party) then preferred this appeal to the High Court.

Babu Nil Madhab Bose (*Babu Hari Bhushan Mookerjee*, with him) for the appellant. The question is, whether a person can redeem a mortgage after the period of grace allowed by the law, and before an order absolute is made. I submit he can. In the pre-ent case the Court accepted the money with notice to the opposite party. Section 93 of the Transfer of Property Act clearly shows that the plaintiff's right to redeem exists until such right is extinguished by an order absolute. The cases of *Nandram v. Babaji* (1), *Sitaram v. Madholal* (2), *Somesh v. Ram Krishna Chowdhry* (3), *Porosh Nath Mojumdar v. Ram Jodu Mojumdar* (4) and *Vedapuratti v. Vallabha Valiya Raja* (5) support my contention. The Court has ample jurisdiction to extend the time, and in this case did so.

Babu Nalini Ranjan Chatterjee, for the respondent. The case of *Vedapuratti v. Vallabha Valiya Raja* (5) lays down, where a suit for redemption has been instituted and a decree for redemption has been passed therein, but not executed, a subsequent suit is not maintainable for the redemption of the same mort-

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(1) (1897) I. L. R. 22 Bom. 771.

(3) (1900) I. L. R. 27 Calc. 705.

(2) (1901) I. L. R. 24 All 44.

(4) (1889) I. L. R. 16 Calc. 246.

(5) (1901) I. L. R. 25 Mad. 300.

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gaga. If a second suit for redemption is barred, the question still remains whether even after the time allowed to redeem, the mortgagee can redeem. I submit he cannot. The Calcutta cases cited by the other side are all cases in foreclosure suits. In a suit for foreclosure time can be enlarged; but in a suit for redemption it cannot be done—see *Novosielaski v. Wakefield* (1). It can only be done, if the application is made before the expiration of time granted to redeem. In the present case no such application was made. In the case of *Ramlal v. Tulsa Kuar* (2) it has been held that in a case of decree for redemption of foreclosure no extension of the time limited by the decree for payment of the decretal amount can be made except for good cause shown; and that case dissents from the case of *Poresh Nath Mojumdar v. Ram Jodu Mojumdar* (3). Section 93 of the Transfer of Property Act says that the Court may postpone the date fixed for payment, upon good cause shown. It clearly shows that it can only be done before the expiration of the time. It is not a case governed by the Transfer of Property Act. The rights of the parties must be decided by the decree made in the suit. The present case is covered by the case of *Faijuddi Sardar v. Asimuddi Biswas* (4), in which it has been held that a party has no right to deposit money after expiry of the time allowed. If the proposition of law laid down in that case is not accepted, the present case should be referred to the Full Bench.

Babu Nil Madhab Bose, in reply.

Our. adv. vult.

CASPERSZ AND COXE JJ. This appeal arises out of a composite suit, in which the plaintiff sued to enforce his mortgage on certain property by sale, as, also, to redeem certain prior encumbrances. The suit was decreed and the plaintiff was directed to deposit the amount due with respect to the prior encumbrances within six months, and it was ordered

(1) (1811) 17 Ves. 417.

(3) (1889) L. L. R. 16 Cal. 246.

(2) (1896) L. L. R. 19 All. 189.

(4) (1907) 11 C. W. N. 679.

that, if he did not do so, he should not be able to redeem. The decree was dated the 31st May 1906. An appeal was lodged by the defendants or some of them, but it was dismissed on some date, which does not appear on the papers and on the 16th April 1907, the plaintiff deposited the money, and asked that the property covered by the mortgage might be sold free of encumbrances, the prior mortgages having been redeemed by the deposit of the money due upon them. The pleader of one of the prior encumbrancers (not the present appellant) was sent for, but declined to appear, and the application was granted on the 14th May 1907.

Thereafter the plaintiff applied to have the decree made absolute. This application was contested by the prior encumbrancers, though it can hardly have had any reference to them, inasmuch as the only relief in the nature of an "order absolute" that can be given to the plaintiff in a suit for redemption is that he "shall, if necessary, be put in possession of the mortgaged property." Here, this was not necessary and the only order that could be made absolute was the order for sale, to which, if their encumbrances had been redeemed by the order of the 14th May 1907, they could not object. They, however, also asked that the order for sale and redemption should be set aside. The Subordinate Judge refused both prayers, made the decree absolute, and confirmed the order for sale and redemption. The learned District Judge set aside these orders. The plaintiff appeals, and it is urged that, in the circumstances we have stated, the orders of the First Court were wrongly set aside by the District Judge.

It appears that the defendant No. 3, respondent, purchased the property in execution of a first mortgagee's decree upon his mortgage. He has a further claim on the property, inasmuch as he also redeemed the mortgage of a second mortgagee, the plaintiff being the third mortgagee. The question is, whether the defendant No. 3 being a purchaser in execution of the decree on a prior mortgage and in possession of the property, section 93 of the Transfer of Property Act, 1882 has any application to his case. It is also urged on his behalf that, if the section

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does apply, still the fact that the plaintiff did not deposit the redemption money within six months precludes him from obtaining any benefit now from the decree for redemption.

Section 93 does not, of course, in its literal terms, apply to a case like the present, where there is no prior mortgage still in existence, but the encumbrancer is a purchaser in possession. But we think that the principles laid down in the section ought certainly to be followed in dealing with a case of this nature. It is well settled that, when a mortgagee sues on his mortgage, and, in disregard of section 85, does not make a subsequent mortgagee a party, that mortgagee is entitled to redeem the property in the hands of a purchaser in execution. There is no reason why such a purchaser should be in a better position with respect to redemption than the mortgagee under whose decree he has purchased. There are no other sections in the Transfer of Property Act dealing with redemption, except sections 91-95. In these circumstances, we are of opinion, that we should be guided by those sections in dealing with the case, whether it is covered by their precise terms or not.

Turning now to the question whether a plaintiff, who does not deposit the redemption money within the time allowed, can redeem afterwards, before a final order is made under the section, or as it is usually expressed, before the decree is made absolute, we find considerable diversity of judicial opinion. The sections, however, seem to us to indicate the intentions of the Legislature with reasonable clearness.

Section 92 requires the decree to lay down that, if the plaintiff pays within a fixed time, the defendant shall retransfer the property to him, and, if he does not pay, he shall be debarred from redeeming (unless the mortgage is simple or usufructuary), or else the property shall be sold (unless the mortgage is by conditional sale). The words in brackets show that the section does not literally apply to the present case. But, applying it as nearly as we can, we think that the position of the defendant No. 3, who is in possession of the property under an obligation to retransfer it, if the money is paid

on a fixed date, is far more analogous to that of a mortgagee by conditional sale, than to that of the holder of any other form of mortgage described in the Transfer of Property Act. The decree framed gave effect to this position, inasmuch as it directed that, if the plaintiff did not deposit the money by the fixed date, he should be debarred from redeeming.

Section 93 lays down what is to happen in the two contingencies of the money being paid and not being paid. In the latter, the defendant is permitted, in the case of a mortgage by conditional sale, to apply for an order that the plaintiff be debarred from redeeming. And the section goes on to prescribe that "on the passing of any order under this section the plaintiff's right to redeem shall be extinguished." It appears to us that this expression clearly indicates that the right to redeem continues till the order has been passed. If this were not so, it is impossible to understand for what reason a mortgagee, other than one whose mortgage was simple or usufructuary, should be specifically allowed to apply for an order to debar the plaintiff from redeeming. If the plaintiff cannot redeem after the fixed period, unless the mortgagee himself takes some action, as has been argued by the learned pleader for the respondents, it is evident that his right is altogether gone. The mortgagee is not likely to take any action, when he is already in possession of the property, in order to enable the plaintiff to exercise his right of redemption. To quote the words of the learned Chief Justice in *Vedapuratti v. Vailabha Valiya Raja* (1). "On the construction of sections 92 and 93 of the Transfer of Property Act it is perfectly clear that the equity of redemption remains unforsclosed, and the relation of mortgagor and mortgagee continues, until the order absolute, which is contemplated by section 93, is made * * * * *. If the right to redeem is only extinguished when an order is made under section 93, it follows that the right is a subsisting right until the order is made." It appears to us that the Legislature intended that the defendant, if he seeks to have the plain-

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tiff's rights finally extinguished, should apply for an order to that effect, and that, if he does not do so, the right should remain in existence.

These views derive considerable support from the Madras case already cited, and from two cases decided in Bomhay and Calcutta, respectively. The Bomhay case of *Nandram v. Babaji* (1) was cited with approval in Madras (2) and is clear authority for the proposition that a mortgagor can apply for extension of the time for redemption after the period of grace has elapsed, but before a final order has been made under section 93. If that view is correct, it would seem, that if a deposit is accepted by the Court before the final order, but after the date fixed for payment, it becomes an effectual deposit. It makes little or no practical difference whether the acceptance of such a deposit is or is not preceded by a formal order extending the time. It is the acceptance of the deposit that is the really important matter, and, if the Court accepts a deposit after the due time has elapsed, it must be assumed, in the absence of anything to the contrary, that the Court is satisfied that there has been good cause for the delay. In the present case it is reasonable to suppose that the Court thought it natural that the plaintiff should have hesitated to pay in a large sum of money, while the fate of his decree was still uncertain, owing to the appeal lodged by the other side. The Court sent for the pleader of the principal defendant and made the order after he had declined to come. All the probabilities point to the fact that the Court saw fit to condone the plaintiff's delay, and that being so, we think that the deposit must be regarded as being in time and upon application made to extend the original period fixed for payment.

The decision of this Court, to which we have referred, considered section 87 rather than the effect of section 93, but it is clearly applicable in principle:—see *Porosh Nath Mojumdar v. Ramjodu Mojumdar* (3), where the learned Judges

(1) (1897) L. L. R. 22 Bom. 771. (2) (1902) L. L. R. 25 Mad. 300.

(3) (1897) L. L. R. 16 Calc. 246, 249.

remark :—" It seems quite clear to us that the fact of the Legislature having made this provision, requiring an order absolute to be made, makes the earlier order simply an order *nisi* and the mortgagor can at any time, until the order absolute is made, redeem his property."

Reference may also be made to *Debi Prasad v. Jai Karan Singh* (1), in which the earlier case of *Ram Lall v. Tulsa Kuar* (2), which is to some extent in favour of the respondents, was not followed.

The learned pleader for the respondents relies principally on two cases, namely, *Vallabha Valiya Raja v. Vedapuratti* (3) and *Faijuddi Sardar v. Asimuddi Biswas* (4). But the authority of the first of these cases has been much weakened by the case reported in the 25th volume, already quoted, and in the words of the learned Chief Justice, in the latter case " can not be put higher than that the learned Judges dealt with the case before them upon the assumption that a second suit would lie and that * * * * the mortgagee * * * * is not without a remedy."

Finally all that was decided in *Faijuddi Sardar v. Asimuddi Biswas* (4) was that the period of grace runs from the date of the original decree and not from that of the appellate decree. The point whether the plaintiff could redeem after the fixed date was not raised, nor does it appear certain whether or not any final order had been made on the application of the defendant.

In these circumstances, we think that the decision of the District Judge must be set aside and that of the Subordinate Judge restored. The appeal is accordingly allowed with all costs.

Appeal allowed.

(1) (1902) I. L. R. 24 All. 479.

(2) (1896) I. L. R. 19 All. 180.

(3) (1895) I. L. R. 19 Mad. 40.

(4) (1907) 11 C. W. N. 679.

CIVIL RULE.

Before Mr. Justice Coxe and Mr. Justice Bell.

JAGADISH CHANDRA SHAHA

v.

KRIPA NATH SHAHA*.

1908

Aug. 10th.

Civil Procedure Code (Act XIV of 1882), ss. 295, 244, 622—Rateable distribution—Different judgment-debtors—Appeal against order under s. 295, if lies—Jurisdiction of High Court to interfere under s. 622.

An order under s. 295 of the Civil Procedure Code passed as between parties who are not the same as in the decree, in execution of which assets were realized under s. 295, is not a decree under s. 244, and no appeal lies against the order, and the order of the District Judge on appeal, setting aside the order of the Munsif, is without jurisdiction.

Held further, that when an order is wholly without jurisdiction, the High Court should interfere under s. 622.

Gonesh Das Bagria v. Shiva Lakshman Bhalai (1), not applicable. *Ramasamy Chettiar v. Orr* (2) followed. *Dayaram Jagjivan v. Govardhandas Dayaram* (3) distinguished.

Prosunno Kumar Sanyal v. Kalidas Sanyal (4) referred to.

CIVIL RULE granted to Jagadish Chandra Shaha.

The petitioner and his minor brother, represented by his mother and guardian, instituted a suit for the recovery of money against one Sree Charan Pal and three others—Raghu Nath, Baikuntha Nath and Krishna Nath Pal in the Court of the 1st Munsif of Dacca and attached before judgment some moveable properties belonging to the said four judgment-debtors and obtained a decree against them.

Thereafter some persons other than Kripa Nath Shaha, Sanatan Shaha and others, who had obtained a decree against the same four judgment debtors and the said Kripa Nath, Sanatan and others, (of whom, some had obtained decrees

* Civil Rule No. 2310 of 1908, against the order of E. J. Drake-Brockman, District Judge of Dacca, dated 16th May 1908, reversing the order of the 1st Munsif of Dacca, dated 21st March 1908.

(1) (1903) I. L. R. 30 Calc. 583.

(3) (1904) I. L. R. 28 Bom. 458.

(2) (1902) I. L. R. 26 Mad. 176.

(4) (1892) I. L. R. 19 Calc. 683;

I. R. 19 I. A. 66

against Sree Charan Pal alone and some against Sree Charan Pal and one of the other three judgment-debtors), applied before the 1st Munsif of Dacca under section 295 of the Code of Civil Procedure for rateable distribution of the assets realized by the sale of moveable properties attached before judgment in execution of the decree obtained by this petitioner and his brother.

On the 21st March 1908, the 1st Munsif of Dacca rejected the application of Kripa Nath Shaha, Sanatan Shaha and the others, who had decrees, but not against all the judgment-debtors. They preferred an appeal against the order of the Munsif, making only the petitioner the respondent. On the 16th May the District Judge of Dacca decreed the appeal *ex parte*.

On the 27th May, the petitioner filed an application for the rehearing of the appeal, alleging, amongst other grounds, that, in consequence of the seal of the District Judge's Court having been affixed on the place on which the date of hearing was written in the notice served on the petitioner, the date was made indistinct.

The application being rejected, the application under section 622 was made to this Court.

Babu Upendra Lal Ray for the petitioner. No appeal lies from an order under section 295. *Gogaram v. Kartick Chunder Singh* (1), *Kashi Ram v. Mani Ram* (2). Section 588 is clear on the point. The order of the District Judge is therefore without jurisdiction. The Full Bench case of *Gonesh Das Bagria v. Shiva Lakshman Bhakat* (3) is inapplicable, that case referring to a regular suit. The order passed cannot be taken as one under section 244, the decrees being separate and the parties different: *Kashi Ram v. Mani Ram* (2).

Babu Sarat Chandra Basak for the opposite party. The order is under section 244 and is appealable: *Prosunno Kumar Sanyal v. Kali Das Sanyal* (4). The section should be liberally construed. The Full Bench case (3) is applicable. Ad-

(1) (1868) 9 W. R. 514.

(2) (1892) I. L. R. 14 All. 210.

(3) (1903) I. L. R. 30 Calc. 583.

(4) (1892) I. L. R. 19 Calc. 683;
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mitting that no appeal lay to the District Judge, the High Court should not interfere in such cases. The discretion under section 622 should be exercised very carefully and only when positive injustice has resulted.

COXE AND BELL JJ. In this case the petitioners obtained a decree against certain judgment-debtors. The opposite party had obtained a decree against certain judgment-debtors, who are not exactly identical with those of the petitioners, and had applied for rateable distribution. The Munsiff of Dacca refused this application on the ground that the judgment debtors were not identical. Against this order, the opposite party appealed to the District Judge; and the District Judge, following the decision in *Gonesh Das Bagria v. Shiva Lakshman Bhakat* (1), set aside the Munsiff's order and directed that the opposite party should share in the rateable distribution.

The petitioner has applied to this Court under section 622 of the Civil Procedure Code, and has obtained a Rule on the opposite party to show cause why the order of the District Judge should not be set aside on the ground that it was passed without jurisdiction.

It is clear that under section 588 of the Civil Procedure Code, an order passed under section 295 of the Civil Procedure Code is not ordinarily appealable; but it is argued on behalf of the opposite party that such an order comes within the scope of section 244 and is therefore open to appeal. Reference has been made to the case of *Prosunno Kumar Sanyal v. Kali Das Sanyal* (2), in which it was laid down that section 244 should be construed with liberality and that a question, which concerned an auction purchaser at an execution sale, was none the less a question coming within that section.

We cannot regard this case as an authority for holding the opposite party in this case, who is a decree-holder under a totally distinct decree, to be a party to the suit, in which the

(1) (1903) I. L. R. 30 Calc. 583.

(2) (1892) I. L. R. 19 Calc. 683;
I. L. R. 19 I. A. 166.

petitioner's decree was passed and entitled therefore to appeal by section 244 of the Code. We think that the order cannot possibly come within the scope of section 244 of the Civil Procedure Code; and that therefore no appeal lay to the District Judge.

Secondly it is argued on behalf of the opposite party that, although no appeal lay to the District Judge, yet this Court should not set aside his order in the exercise of the discretion vested in it by section 622 of the Civil Procedure Code.

The learned pleader for the opposite party has not, however, been able to show us any case in this Court in which it refused to interfere with an order, which was passed wholly without jurisdiction. By the order of the Munsiff the petitioner obtained a right to execute his decree free from the interference of the opposite party. The order giving him this right may, or may not, have been just, but it cannot be set aside except in accordance with the law. The case of *Ramasamy Chettiar v. R. G. Orr* (1) is an authority for holding that in cases like the present the High Court is bound to interfere, and although in *Dayaram Jagjivan v. Govardhandas Dayaram* (2) the learned Judges refused to interfere under section 622 with an order passed without jurisdiction, yet their refusal was based on such special circumstances, as to be no authority to justify us in refusing to exercise the power, which section 622 gives us in a case like the present.

The result is that the Rule is made absolute and the order of the District Judge, dated the 16th May 1908, is set aside.

Rule absolute.

S. M.

(1) (1902) L. L. R. 26 Mad. 173.

(2) (1894) L. L. R. 28 Bom. 438.

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ORIGINAL CIVIL.

Before Mr. Justice Fletcher.

JYOTI PROKASH NANDI

v.

JHOWMULL JOHURRY*.

1908

June 29

Conspiracy—Auction sale—Fraud—Combination among bidders not to bid against each other—Cause of action—Fraud, allegations of, to be specifically pleaded.

A combination among bidders at an auction, not to bid against each other, even if the combination amounts to a "knock-out", does not give rise to an action at the suit of the vendor.

Ambica Prosad Singh v. R. H. Whitwell (1), *Fuller v. Abrahams* (2), *Levi v. Levi* (3), dissented from. *Doolubdass v. Ramlall* (4), referred to.

Allegations of fraud must be specifically pleaded: general allegations however strong, are insufficient to amount to an averment of fraud of which any Court ought to take notice.

Wallingford v. Mutual Society (5), and *Ganga Narain Gupta v. Tiluckram Chowdhry* (6), followed.

ORIGINAL SUIT.

THIS suit was instituted by the plaintiff Jyoti Prakash Nandi and his infant brothers through their guardian, against the defendant Jhowmull Johurry and others to recover the sum of Rs. 42,000 as damages for forming a combination, alleged to be illegal, fraudulent and opposed to public policy, for the purpose of avoiding all competition at an auction of certain jewellery held at Bardwan on the 9th April, 1907.

The plaintiffs alleged that a sale by public auction to the highest bidder of certain jewels was advertised by them, to be held at Bardwan on the 8th April 1907 and on subsequent days. The auction was held, as advertised, on April 8th in the presence and under the supervision and control of Jyoti Prakash and the guardian, and certain jewels and ornaments were sold. On the 9th and 10th April, similarly, auctions were held and

* Original Civil Suit No. 491 of 1907.

(1) (1907) 6 C. L. J. 111.

(2) (1921) 3 Brod. and B. 116.

(3) (1922) 6 Car. and P. 239.

(4) (1850) 15 Jar. 257.

(5) (1880) L. R. 5 A. C. 435, 627.

(6) (1898) L. L. R. 15 Cal. 533.

certain other jewels and ornaments were sold. It was with regard to the second day's sale, which realised the sum of Rs. 44,310, that the present suit was instituted (a second similar suit having been filed in respect of the third day's sale) the plaintiffs alleging that the auction of April 9th had been reduced to a nullity and the goods sold at a gross undervalue owing to an illegal and fraudulent combination effected by the defendants. It was alleged that a large number of the bidders at the auction held on April 8th, finding that the articles sold that day fetched a fair price on account of the competition among the bidders, conspired to form a combination of the intending purchasers at the subsequent days' sales not to bid against each other so as to avoid all competition and so to purchase the articles put up to auction at an undervalue.

They accordingly nominated 11 persons as a syndicate to represent the combination at the auction of April 9th, and it was agreed that the articles so purchased should be resold in Calcutta, and five members were nominated to form a *punch* to distribute the profits so secured amongst the members of the combination.

The articles purchased on April 9th on behalf of the combination for the sum of Rs. 44,310, were subsequently resold in Calcutta, it was alleged, at a profit of Rs. 42,000. Disputes however arose amongst the members of the combination as to the distribution of the profits on the resale and the moneys were deposited in the Bank of Bengal in the names of the defendants Jhowmull Johurry and Chooni Lal.

The dissensions among the members of the combination eventually resulted in two suits being instituted by one of the members Hari Charan Kharad and in two rules being obtained by him against Jhowmull and Chooni Lal. At the hearing of these suits on June 12th, 1907, the plea was taken by the defendants, who were also defendants in the present suit, that the combination, out of which the profits accrued, was illegal and fraudulent and amounted to a criminal conspiracy, the intention being to nullify the auction and defraud the owners

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of the articles. These suits were, however, withdrawn before final determination and the matters in dispute were referred to arbitration.

It was alleged by the present plaintiffs that they first came to know of the existence of this conspiracy from an account that appeared in the newspapers on May 25th, 1907, of the application for the rules in the suits mentioned above, and thereupon the present suit was instituted.

In their written statements, the defendants admitted the formation of a combination among certain of the bidders at the auctions, and the nomination of the syndicate, but denied the allegations of fraud and conspiracy, or that the combination included all the purchasers at the auctions. They further denied that the auction purported to be to the highest bidder, and alleged that the owners had expressly reserved to themselves the right of refusing to sell even to the highest bidder and had reserved prices at an appraisal fixed by professional jewellers.

Mr. B. C. Miller (Mr. Chakravarti and Mr. N. Sen with him) for the plaintiffs. The combination among the defendants at the auction was illegal and fraudulent as it was for the purpose of avoiding all competition. There is a distinction between an honest combination among intending purchasers and dishonest concert for the suppression of all competition. It is the object, which determines whether a combination is lawful or otherwise. The object here having been to stifle an honest auction and so to obtain the articles at a sacrifice, the combination was fraudulent. See *Ambica Prasad Singh v. R. H. Whitwell* (1), *Gobindo Chandra Jha v. Shyam Lal Jha* (2) *Pran Nath Roy v. Khagendra Mahata* (3). [Fletcher J. referred to *Gallon v. Emuss* (4).] This case is distinguishable from *Mogul Steamship Company v. McGregor Gow & Co.* (5), where it was found that both the object and the means employed were lawful. In the present case, the

(1) (1907) 6 C. L. J. 111.

(3) 1903) 12 C. W. N. clv.

(2) (1901) 1 C. L. J. 85.

(4) (1844) 1 Coll. C. C. 243.

(5) [1891] A. C. 25.

secrecy of the combination was a badge of fraud. Had the conspiracy come to the knowledge of the plaintiffs, they could have stopped the sale. A conspiracy to injure, resulting in damage, gives rise to civil liability. The profit of nearly 100 per cent., which the defendant secured on the resale, was the damage suffered by the plaintiffs. A conspiracy to injure—an oppressive combination—differs from an invasion of civil rights by a single individual. Certain kinds of conduct not criminal in any one individual may become criminal, if done by combination among several. See *Mogul Steamship Company v. McGregor Gow & Co.* (1), which was followed in *Giblan v. National Amalgamated Labourers, Union of Great Britain and Ireland* (2). See also *Quinn v. Leatham* (3), and *Lambton v. Mellish* (4). [Fletcher J. *Lambton v. Mellish* (4) was overruled by *Sadler v. Great Western Railway Co.* (5)].

Mr. H. D. Bose (*The Advocate-General*, Mr. Sinha and Mr. A. Chaudhuri with him) for some of the defendants. This suit is not maintainable: the plaint does not disclose any cause of action. An agreement between two or more persons not to bid against each other at an auction, even if amounting to a "knock-out" is not illegal and does not invalidate the sale. See Halsbury's *Laws of England*, Vol. I., p. 512; *Encyclopædia of the Laws of England*, Vol. I., p. 414. See also *In re Carew's Sale Act* (6), *Galton v. Emms* (7), *Doolub Dass v. Ramlall* (8), *Heffer v. Martyn* (9), *Gobind Chundra Gangopadhyaya v. Sherajunnissa Bibi* (10), *Doorga Singh v. Sheo Pershad Singh* (11), and *Hari Bal Krishna v. Naro Moreshtar* (12).

[Fletcher J. How do you distinguish *Ambica Prasad Singh v. R. H. Whitwell* (13) and *Gobindo Chandra Jha v. Shyam Lal Jha* (14). These decisions appear to be contradictory to the decision in *Chandra Gangopadhyaya v. Sherajunnissa Bibi* (10)].

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The decisions in those two cases were based on *Levi v. Levi* (1) and *Fuller v. Abrahams* (2), both of which cases are now considered bad law : besides, those cases referred to auctions by the Court and the dicta relied on are *obiter*. *Doolubdass v. Ramallal* (3), a Privy Council case, is conclusive on the subject. See also *Mahomed Meera Ravuthar v. Savvasi Vijaya Raghunadha Gopalar* (4). Assuming the object of the combination to have been to obtain the articles at the cheapest price, this in itself was not a ground of fraud. There was no malicious intention to injure the owners. The present case falls within the authority of *Mogul Steamship Company v. McGregor Gow & Co.* (5). It is only if a combination be actuated by a malicious intention to spite and injure another without just cause that it becomes actionable. See *Denaby and Cadeby Main Collieries Limited v. Yorkshire Miners Association* (6).

Mr. B. C. Mitter in reply. The following authorities relied on by the defendants, *Galton v. Emuss* (7), *In re Carew's Estate Act* (8), *Heffer v. Martin* (9), were all cases of an agreement between two persons not to bid against each other, and therefore to be distinguished. Such a combination is not oppressive and would not be fraudulent *Gobindo Chandra Gongopadhyaya v. Sherajunnissa Bibi* (10) was a case under the Revenue Sale Laws, which are stringent.

Cur. adv. vult.

FLETCHER J. This is a suit brought by the plaintiffs against the defendants to recover damages for a conspiracy in forming a combination of all intending bidders to avoid all competition at an auction of certain jewellery held at Burdwan on the 9th April 1907.

The plaint alleges that the combination was "illegal and fraudulent," "an artifice" and so forth.

- (1) (1833) 6 Car. and P. 239.
- (2) (1821) 3 Brod. and B. 116.
- (3) (1850) 15 Jur. 257.
- (4) (1899) L. R. 27 I. A. 17.
- (5) [1891] A. C. 25.

- (6) [1906] A. C. 384, 400.
- (7) (1844) 1 Coll. C. C. 243.
- (8) (1858) 28 L. J. Ch. 218.
- (9) (1867) 36 L. J. Ch. 372.
- (10) (1882) 13 C. L. R. 1.

The question has first been argued before me whether or not the plaint discloses a cause of action.

Now it is an acknowledged rule of pleading that allegations of fraud must be specific.

"With regard to fraud if there be any principle which is perfectly well settled it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud, of which any Court ought to take notice." See *Wallingford v. Mutual Society* (1).

The present case is really governed by the decision of the Judicial Committee in *Gunga Namin Gupta v. Tuluckram Choudhury* (2). Take the test applied by their Lordships in that case and apply it to the present, by striking out from the plaint in the present suit the words "illegal and fraudulent," "artifice" and so forth. And what remain? Nothing, except certain allegations of fact that may be quite innocent. But then it is said on behalf of the plaintiffs that having regard to the decision of this Court by Mookerjee and Hohnwood JJ. in *Ambica Prasad Singh v. R. H. Whitwell* (3) the plaint in the present case does disclose a cause of action.

The learned Judges in that case appear to have held that, if the object of the combination is to make a fair bargain, it is lawful, but if the object is to obtain the property at a sacrifice, it is unlawful. The learned Judges place reliance for their decision on two English authorities, *Fuller v. Abrahams* (4) and *Levi v. Levi* (5) and on several American cases and on the statement in an American text book (Greenhood on the Doctrine of Public Policy). The case of *Levi v. Levi* (5) was however only a ruling at *nisi prius* and has been dissented from by the Judicial Committee in *Doolubdass v. Ramall* (6).

The case of *Fuller v. Abraham* (4) seems to stand alone amongst English cases and the Court in that case in discharg-

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(1) (1880) L. R. 5 A. C. 685, 697.

(2) (1888) L. L. R. 15 Calo. 533.

(3) (1907) 6 C. L. J. 111.

(4) (1821) 3 Brod and B. 116.

(5) (1833) 6 Car. and P. 239.

(6) (1850) 15 Jur. 257.

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ing the rule nisi for a new trial did not give the grounds of their decision. With regard to the American cases cited by the learned Judges in *Ambica Prasad Singh v. R. H. Whitwell* (1). I am not competent to express any opinion. But with regard to the statement from Greenhood's Doctrine of Public Policy, cited by the learned Judges, I may point out that the opinion expressed by that learned author is not in keeping with the opinion expressed in a recent work of a very distinguished lawyer. I refer to Volume I of the Laws of England by the Earl of Halsbury. In that volume at page 512 the noble and learned Earl expresses the opinion that the fact that a combination amongst bidders has been formed to bid at an auction, even if the combination amounts to what is commonly known as a "knock-out", does not give rise to an action at the suit of the vender. The decision of the learned Judges in *Ambica Prasad Singh v. Whitwell* (1) does not touch the point as to whether without specific allegations of fraud the plaint discloses a good cause of action. In this respect it is sufficient for me to rest my judgment on the decision of the Judicial Committee in *Gunga Narain Gupta v. Tiluckram Chowdhry* (2), the facts in which case are practically on all fours with the present.

Accordingly I hold that the plaint does not disclose any cause of action. The plaint must therefore be rejected and taken off the file. The plaintiffs must pay to the defendants their costs of suit.

Suit dismissed.

Attorney for the plaintiffs : B. S. Ghose.

Attorneys for the defendants : N. C. Bose, Manuel and Agarwala.

(1) (1907) 4 G. L. J. 111.

(2) (1888) I. L. R. 16 Cal. 537.

LETTERS PATENT APPEAL.

Before Hon'ble Mr. R. F. Rampini, Acting Chief Justice, and Mr. Justice Doss

JADU NATH DANDPUT

v.

HARI KAR.*

1903

Aug. 20.

Limitation—Distraint—Compensation, suit for—Illegal distress—Limitation Act (XV of 1877) Sch. II, Arts. 36, 39, 49—Tort—"Malfeasance"—"Trespass upon immoveable property."

Per RAMPINI, A. C. J. A suit for compensation for illegal distress, and cutting and carrying off standing crops is governed by Art. 36, Sch. II of the Limitation Act, such acts of tort constituting "malfeasance" within the terms of that Article.

Mohesh Chandra Das v. Hari Kar (1) approved. *Mangun Jha v. Dolhin Golab Koer* (2), distinguished.

Per DOSS J. Wrongfully cutting and carting away crops amounts to "trespass upon immoveable property" and to "wrongfully taking specific moveable property" within the meaning of Arts. 39 and 49, Sch. II of the Limitation Act; and a suit for compensation for such acts is governed partly by Art. 39 and partly by Art. 49 of the Act.

Mangun Jha v. Dolhin Golab Koer (2), referred to.

LETTERS PATENT APPEAL against the judgment of GEIDT J.

THIS appeal arose out of suits brought by the plaintiffs for compensation in respect of paddy grown on their respective lands, but seized and reaped at the instance of the defendant No. 1, who, after an unsuccessful litigation with the real landlord of these plaintiffs, caused to distrain the paddy, taking out an order from Court on the false allegation and application of a fictitious person as landlord, under whom a fictitious tenant was said to have grown the crop in suit.

The plaint was filed on the 25th of June 1903; and the wrongful distraint and cutting away of the crops took place in November or December 1900.

The defendants contended, *inter alia*, that the suit was barred by limitation, it having been instituted after a lapse

* Letters Patent Appeals Nos. 107 to 111 of 1906, in Appeal from Appellate Decrees Nos. 2208, 2663, 2664, 2665 and 2666 of 1904.

(1) (1905) 9 C. W. N. 376.

(2) (1898) L. L. R. 25 Cal. 692.

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of two years from the date of the alleged misappropriation of the crops.

The Court of first instance decreed the suit overruling the plea of limitation.

On appeal preferred by the defendants, the learned Subordinate Judge affirmed the judgment and decree of the first Court, and dismissed the appeal holding that Art. 39, Sch. II of the Limitation Act was applicable to the case.

The defendants appealed to the High Court.

The value of the subject matter of the suit being less than Rs. 1,000, the second appeal was heard by Mr. Justice Geidt sitting alone. His Lordship, relying on the case of *Mohesh Chandra Das v. Hari Kar* (1) was of opinion that Art. 36, Sch. II of the Limitation Act was applicable to the case and that, consequently, the suit was barred by limitation.

The plaintiff then preferred this appeal under s. 15 of the Letters Patent.

Babu Krishna Prasad Sarbadhikari, for the appellant.

Babu Jogesh Chunder Dey, for the respondent.

RAMPINI A. C. J. This is a Letters Patent appeal against a decision of Mr. Justice Geidt.

The appeal arises out of a suit for compensation for the illegal distress, and the cutting and carrying off of standing crops. Mr. Justice Geidt relying on the decision of this Court in *Mohesh Chandra Das v. Hari Kar* (1), has held that the Article of the Limitation Act applicable is Art. 36, and that the suit is accordingly barred as brought more than two years after the accrual of the cause of action.

On behalf of the plaintiff it has been contended that Mr. Justice Geidt's decision is wrong, and that the Article applicable is not Art. 36, but some other Article allowing 3 years for the suit and that the case relied on by Mr. Justice Geidt is

at variance with the Full Bench decision in *Mangun Jha v. Dolhin Golab Koer* (1).

I am unable, however, to see that Mr. Justice Geidt's judgment is wrong. I consider that the Article of the Schedule to the Limitation Act applicable is Art. 36. I have always been of this opinion :—see the Full Bench case above referred to and *Surat Lall Mandal v. Umar Haji* (2). The facts of the Full Bench case are different from those of the case of *Mohesh Chandra Das v. Hari Kar* (3). In the former case there seems to have been no illegal distress. In the latter case there was. Hence it does not appear that the decisions in the two cases are contradictory.

My learned brother considers that the Article of the Limitation Act applicable is partly Art. 39 and partly Art. 49. I am unable to take this view, because it would seem to me that the acts of the defendants did not amount to mere trespass on immovable property as provided for in Art. 39, but to "trespass" and "conversion" of immovable property (not "moveable property" to which Art. 49 applied), and that such acts of tort constitute "malfeasance" within the terms of Art. 36. There is no provision in the Letters Patent for reference to a third Judge, when there is a difference of opinion in a Letters Patent appeal. The appeal is therefore dismissed with costs. This order governs the analogous appeals, which are also dismissed with costs.

Doss J. This is an appeal in an action brought by the plaintiff for compensation under the following circumstances :—

In his plaint he alleged that the defendant No. 1 set up defendant No. 8, as the landlord and the husband of defendant No. 9 as the tenant, with regard to his holding and having obtained a process for distraint from the Court, caused the standing crops on his holding to be distrained and subsequently cut and removed them in collusion with the peon,

(1) (1898) I. L. R. 25 Calc. 692. 2) (1895) I. L. R. 22 Calc. 877.

(3) (1905) 9 C. W. N. 376.

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deputed by the Court to distrain the crops and that thereby he had sustained great loss. Among various other pleas, which for the purposes of this appeal it is unnecessary to notice, the defendant No. 1 raised the plea of limitation and denied the facts alleged by the plaintiff. The Munsiff found the allegations of the plaintiff to be true and he overruled the plea of limitation on the ground that Article 48 of the second schedule of the Limitation Act, which provides 3 years as the period of limitation for a suit of this kind, applied to the case, and that, as the suit had been brought within 3 years from the date of cutting the crops and the removal thereof from the holding (though more than 2 years after that date), it was within time. On appeal by the defendants, the learned Subordinate Judge concurred in the finding of the Munsiff on the facts and with regard to the question of limitation thus observed in his judgments. "In these cases persons having no concern with the lands yielding the crops in dispute are the tortfeasors, so Art. 39 appears to my mind to be applicable and Arts. 48 and 49 may apply to the removal of the crop itself." As 3 years' limitation is provided by each of these Articles, he held that the suit was saved from limitation.

On appeal by the defendants to this Court, the learned Judge, who decided the appeal, has, relying on the case of *Mohesh Chandra Das v. Hari Kar* (1), held that the suit fell within Article 36 of Schedule II of the Limitation Act, which allows 2 years for bringing such a suit, and, as it was brought more than 2 years after the date of the cutting and removal of the crops, he has held that the suit is barred by limitation.

The plaintiff has appealed from this judgment under section 15 of the Letters Patent.

I think the view taken by the learned Judge of this Court is opposed to the decision of the Full Bench in the case of *Mangun Jha v. Dohin Golab Koor* (2). I am of opinion that the view taken by the learned Subordinate Judge on the question of limitation is correct.

In the last mentioned case the defendants under colour of an order of the Criminal Court had wrongfully cut

and carried away standing crops from the plaintiff's land. Similarly in the present case the defendant No. 1, who is a perfect stranger and not the landlord of the plaintiff, had obtained an order for distraint in the name of a fictitious landlord against a fictitious tenant; and under colour of that order had caused the standing crops on the plaintiff's land to be distrained. This is not a case of illegal or irregular distress (which I understand to mean distress in contravention of the provisions of law relating to distress) by the landlord, but by a perfect stranger. When, therefore, the defendants, under colour of such an order for distraint entered upon the land of the plaintiff and cut the standing crops on it, they clearly committed a pure act of trespass upon his land and when they took away the crops after they had been severed from the land, they wrongfully took away "specific moveable property." It appears to me, therefore, that the fact of the so-called distraint in this case makes no material difference, and it is to my mind indistinguishable from the Full Bench case, at any rate so far as the *ratio decidendi* of that case is concerned.

I do not think Article 36 applies to this case. The words of that Article in the first column are "for compensation for any malfeasance, or misfeasance or nonfeasance independent of contract and not herein specially provided for." I am inclined to think that the following passage in Stephen's Commentaries, 14 Ed., Vol. III, page 384, furnishes a guide to the sense in which these words have been used in this Article. That passage runs thus:—"Personal actions are actions founded either on contracts or on torts; that is to say, they are either actions *ex contractu* or actions *ex delicto*; torts being wrongs independent of contract; and being either (i) nonfeasances, or the omission of acts which a man was by law bound to do, or (ii) misfeasances, or the improper performance of lawful acts or (iii) malfeasances, or the commission of acts, which were themselves unlawful." This view gains support from the fact that in Article 40 of Act IX of 1871, which has been re-enacted in Article 36 of Act XV of 1877, the words were "for compensation or any wrong,

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malfeasance, nonfeasance or misfeasance, etc." In the last mentioned Act the expression "wrong" has been omitted on account of redundancy; the next succeeding words malfeasance, nonfeasance or misfeasance, taken together denoting the same idea, and covering the same ground as is done by the preceding generic word "wrong," and being in fact subdivisions of the latter. There cannot, therefore, be any doubt that Article 36 contemplates suits for compensation for all kinds of torts or wrongs, except those for which special provision has been made by other Articles in the same Act. Articles 39 and 49 together with several other Articles, to which it is not necessary to refer, fall within this exception and for them a period of 3 years' limitation has been provided. In the same volume of the Commentaries at page 385, trespass is thus defined: "trespass" where the plaintiff claims damages for a trespass *vi et armis*, i.e., for an injury accompanied with actual force, i.e., wrongful entry upon land or a wrongful taking and keeping of personal chattels; "trover" where the wrongful taking being waived the plaintiff claims damages for the wrongful keeping or "wrongful conversion."

Trespass may be committed by an entry on 'another's' land i.e., trespass *quare clausum fregit* or by taking another's goods (trespass *de bonis asportatis*). Conversion is an unauthorized act, which deprives another of his goods, and the essence of the wrong is the dealing with the use and possession of the goods of another adversely to him and in a manner inconsistent with his right of dominion

It seems to me, therefore, that Article 30 of the second schedule of the Limitation Act corresponds to the first kind of trespass; Article 48 and the first portion of Article 49, which is "for other specific moveable property or for compensation or wrongfully taking or injuring the same," correspond to the second kind of trespass, or asportation (Article 48 relating to trespass or asportation, where the owner has no knowledge of the person, who has possession of the goods and the first portion of Article 49 relating to trespass or asporta-

tion where he has such knowledge); and the second portion of Article 49 corresponds to conversion.

If the defendants, after entering on the plaintiff's land, had cut the standing crops and left them there, the wrong thus done would have been a trespass upon immoveable property coming within Article 39, the act of cutting the crops being an aggravation of the wrong committed by the bare entry on the land and calling for substantial damages. By the act of cutting the crops a portion of the immoveable property (standing crop before it is severed from the land being manifestly immoveable property) is transmuted into specific moveable property, the right to which is vested in the owner of the land, albeit the transmutation is effected by the act of the tortfeasor. Suppose the tortfeasor, after he has cut the crop, is prevented by the owner from taking it away and is expelled from the land, and a little while after, when the owner happens to be absent, a third person comes in and takes the crop away, the taking of the crop by the third person would, in that case, clearly amount to "wrongfully taking away specific moveable property." Why should the removal of the crop by the tortfeasor himself, soon after he has cut the same, be any the less wrongful taking away of "specific moveable property?" Indeed, the character of moveable property is impressed on the crop the moment it is severed from the land. Why should the person, so to say, of the appropriator cause any difference in the character of the property? Why should the period of limitation in the former case be 3 years, and in the latter case 2 years? It is possible that the framers of Article 49 had not in their minds the case now in hand, but that is no reason why we should not apply that Article to it, if the ordinary and natural meaning of the words used fairly warrant its application. It seems to me, therefore, that the subsequent act of carrying away the severed crop is in the words of Article 49, "wrongful taking away specific moveable property" and falls within the first portion of that Article. It does not fall under Article 48, because the owner

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has from the beginning knowledge of the person, who has possession of the goods.

I am of opinion, therefore, that the suit falls partly under Article 39 and partly under Article 49, and 3 years being the period of limitation in each case, it is not barred by limitation.

For these reasons, the appeal ought to be decreed, the judgment appealed against set aside and the judgment and decree of the Court of Appeal below restored.

I regret very much I am constrained to differ from the learned Chief Justice in this case.

Appeals dismissed.

U. D. D.

APPELLATE CIVIL.

Before Mr. Justice Sharfuddin and Mr. Justice Cox.

DIN TARINI DEBI

v.

KRISHNA GOPAL BAGCHI.*

1908
Dec. 2, 3, 14.

Will, validity of—Construction of Will—Sambandha-nirnaya patra, whether can operate as a will.

A *sambandha-nirnaya patra* (matrimonial arrangement deed) attested by two or more witnesses devising property (in favour of a person marrying the daughter of the executant of the deed) to take effect after the death of the executant and his wife, if revocable, operates as a valid will of the executant.

Shumsool Hooda v. Shevukram (1), *Hurpurshad v. Sheo Dyal* (2), *Kalian Singh v. Sanwal Singh* (3), *Haydar Ali v. Taraddul Rasul Khan* (4), *Balbhaddar Singh v. Shonarain Singh* (5), *Sita Koer v. Deonath Sahay* (6) and *Ram Moni Das v. Ram Gopal Shaha* (7) referred to.

APPEAL by Din Tarini Debi, the objector No. 2.

This appeal arose out of an application for the grant of Letters of Administration with a copy of the will annexed alleged to have been executed by one Ram Chandra Talapatra in favour of one Krishna Gopal Bagchi, the applicant for the grant.

It appeared that the youngest daughter of Ram Chandra was married to the petitioner, Krishna Gopal Bagchi, who was then not in good circumstances. The document in question, *Sambandha-nirnaya patra*, was executed some days before the marriage and attested by three witnesses. The objectors alleged that the deed produced by the petitioner was not the genuine document executed by Ram Chandra; and they further urged that it was merely an agreement or marriage contract and, therefore, it could not operate as a will.

* Appeal from Original Decree, No. 443 of 1906, against the decree of S. N. Huda, District Judge of Farnas and Bogra, dated Sept. 6, 1906.

(1) (1874) L. R. 2 I. A. 7.

(4) (1890) L. L. R. 18 Calc. 1;

L. R. 17 I. A. 82.

(2) (1876) L. R. 3 I. A. 259.

(5) (1899) L. R. 26 I. A. 194.

(3) (1884) L. L. R. 7 All. 163.

(6) (1904) 8 C. W. N. 614.

(7) (1908) 12 C. W. N. 912.

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The document was executed by Ram Chandra Talapatra on the 16th Sraban 1296 B.S., and ran as follows :—

"Salutation to Prajapati (Lord of the creation).
(Mark of Rupee in Vermilion).

"This auspicious deed of *Sambandha-nirnaya patra* (deed of matrimonial arrangement) is executed as follows :—I settle the auspicious marriage of my daughter, Srimati Trailokya Tarini Debi, with Sriman Krishna Gopal Deb-Sarma Bagchi The condition laid down in that behalf is that the said Sriman Krishna Gopal shall permanently live in my family dwelling house at Patul, maintaining the ceremonies in honour of the Deities and my ancestors ; and on the demise of me and of my legally married wife, he shall be entitled to, and be in possession of, all the moveable and immoveable properties left by me. It shall now rest with me to make all rules for the ceremonies and I shall do all things To this effect I execute this *patra* named the auspicious *Sambandha-nirnaya*."

(Attested by—)

"Harish Chandra Bhowmik	} of Patul."
Panchanan Sarma Talapatra	
Lakshmi Kantha Sarma Talapatra	

The above document was in the shape of a letter and addressed to one Ratanmoni Dehi, an aunt of Krishna Gopal Bagchi.

The District Judge held that the document was a genuine one, and that as it was to take effect after the death of Ram Chandra and his wife, and as Ram Chandra had full power to alter or revoke it, the document was meant to be a will ; and he accordingly granted Letters of Administration to the petitioner.

The objector No. 2 appealed to the High Court.

Babu Dwarka Nath Chakravarti (*Babu Rama Kanta Bhattacharjee* with him), for the appellant. The document, *sambandha-nirnaya patra* is not a will at all. It was marked with vermilion to shew that it was merely a marriage contract, and was never intended to be a will. The signatures on the document were forged to give it an appearance of a testamentary disposition. The writer of the document refused to sign it. A *sambandha-nirnaya patra* being merely a marriage contract, it can never operate as a will. A similar question was decided in the Privy

Council case of *Bhoobun Moyce Debia v. Ram Kishore Acharj Choudhry* (1). No testamentary disposition was intended by this document—both the name of the document and the occasion of its execution being opposed to such a supposition. It is submitted that the document is not legally proved, and it not being a testamentary disposition, Letters of Administration should not be granted in this case.

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Babu Golap Chandra Sarkar (*Babu Mohini Mohan Chuckerbutty* and *Babu Debendra Nath Bagchi* with him), for the respondents. If there be a disposition of property to be carried into effect after the donor's death, it is a will. It is not necessary that the legatee should take possession of the property immediately at the death of the testator. In this case the wife has a life estate, and after her death the son-in-law is to get it. The following cases were referred to:—*Ram Moni Dasi v. Ram Gopal Shoho* (2) *Shumsool Hooda v. Sheewukram* (3), *Hurpurshad v. Sheo Dyal* (4), *Haidor Ali v. Tasadduk Rasul Khan* (5), *Balbhaddor Singh v. Sheo Narain Singh* (6); and to *Mayne's Hindu Law*, 7th Edition, para. 429. The wording of the document is quite clear according to the provisions of the Succession Act. [SHARFUDDIN J. Could Ram Chandra alienate any portion of the property after the execution of the document, or revoke it?] Yes, he could; and he did actually alienate a portion of the same in his lifetime.

Babu Dwarka Nath Chakravarti, in reply.

Cur adv. vult.

SHARFUDDIN AND COXE JJ. This is an appeal against the order of the District Judge of Pabna, dated the 6th of September 1906, granting Letters of Administration with the will annexed to one Krishna Gopal Bagchi. The facts of the case

(1) (1865) 10 Moo. L. A. 279.

(4) (1876) L. R. 3 L. A. 250.

(2) (1908) 12 C. W. N. 942.

(5) (1890) L. L. R. 18 Calc. 1;

(3) (1874) L. R. 2 L. A. 7.

L. R. 17 L. A. 82.

(6) (1899) L. L. R. 27 Calc. 344; L. R. 20 L. A. 194.

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are that one Ram Chandra Sarma Talapatra had four daughters and one son. The youngest daughter was named Srimati Trailokhatarini Devi. She was unmarried when a certain document, which is Exhibit I in this case, was executed by the deceased Ram Chandra Sarma Talapatra. His other three daughters had already been married at the time, and were living with their respective husbands. Ex. No. 1, which is propounded by the petitioner as the will of the deceased Ram Chandra, was executed in 1296 when the deceased was about 60 years of age. Exhibit I is styled in the document itself a *sambandha-nirnaya patra* and is in the form of a letter addressed to Ratanmoni Debi, an aunt of Krishna Gopal Deh Sarma Bagchi. The expression *sambandha-nirnaya patra* means a matrimonial arrangement deed. This letter informs the addressee that the writer has settled the marriage of his daughter with Krishna Gopal on condition that Krishna Gopal shall after the marriage live in the writer's family dwelling house at Patul, and that on the demise of the writer and his legally married wife, Krishna Gopal shall be entitled to, and be in possession of, all the moveable and immoveable properties left by him.

The above document appears to have been attested by three witnesses, namely, Hurish Chundra Bhowmik, Panchanan Sarma Talapatra, and Lakshmi Kantha Sarma Talapatra. The first two are said to be dead and the last has been examined as a witness for the petitioner. The objectors to the application are three, namely, Peary Mohan (son of the first daughter of Ram Chandra) Din Tarini Debi (his third daughter) and Debendra Narain Mozumdar (a son of the second daughter). It is admitted by the objectors that Ram Chandra executed a *sambandha-nirnaya patra*—a little before his youngest daughter's marriage; but it is said that the document propounded by the applicant is not the one that was so executed; and that even assuming the document to be genuine, it cannot operate as a will. It is only the objector No. 2, namely, Din Tarini Debi, who now appeals to this Court, and the grounds

taken before us are identically the same as were taken in her petition of objection, dated 20th of April, 1906.

Before dealing with the proper interpretation of the deed in question, we will dispose of the appellant's allegation that the document, Ex. I, is not the one that was executed by Ram Chandra before his youngest daughter's marriage. It is urged on behalf of the appellant that it is not customary for such a document to be attested by witnesses. This no doubt is true, but in this connection we must not lose sight of the fact that the intending bridegroom was a young man in poor circumstances, who expected to improve his pecuniary circumstances by his marriage with the daughter of an old man, who was in possession of some properties. Witnesses say that it was Krishna Gopal himself who desired that the document should be attested by witnesses. We think that Krishna Gopal's anxiety to secure attestation of witnesses was nothing but natural. That he should want to make his position pecuniarily better by securing a deed, which could be used to his own benefit, is consistent with his poor and straitened circumstances. He was in fact induced to marry Ram Chandra's youngest daughter by the hope of getting all the properties that Ram Chandra might leave after his death. It is urged on behalf of the appellant that no witness attested the document that was really executed by Ram Chandra, and that the document propounded is not the document that was executed, in other words it is alleged that this is a forged document and that two dead men's names have been forged as attesting witnesses. This document was executed in 1296, which corresponds to 1889 A. D. The application for Letters of Administration was made in 1906, that is to say, seventeen years after execution. Two of the witnesses are said to have died during this interval. It is evidently not at all improbable that two of them should die during this period. If this were a forged document, as is alleged, it would have been the easiest thing possible to secure its attestation by three living persons instead of forging the names of two men, who are said to have died, thus weakening the case by having only one wit-

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ness to attest the document. A forger always takes good care to remove all suspicions ; but here, if we accept the theory of forgery, we find the applicant relying on the slender testimony of one single witness. If we are to accept the evidence of Lolit Mohan Talapatra, witness No. 2 for the objector, we should have to find that the signature of Lakshmi Kantha Talapatra has also been forged. This witness on seeing the deed in question says,—“The signature in this deed is not that of Lakshmi Talapatra.” But we find that Lakshmi Talapatra witness No. 1 for the applicant, on seeing Exhibit No. I says “This bears my signature.” If Lakshmi Kantha Talapatra is a creature of the applicant and has given false evidence in attesting as his own a signature which is not his, it is surprising that, if he was prepared to go so far, he should hesitate to put his signature on the deed and attest it as his own.

We find from the evidence of Lolit Mohan, witness No. 1 for the objector, that he is not prepared to swear that Ram Chandra's signature on the deed is not genuine. He says that he has seen Ram Chandra sign his own name, but he adds “It is difficult for me to say whether it is Ram Chandra's writing or not.” Although at another place he says “I do not know whose signature it bears. It does not seem to me to be Ram Chandra's signature.” The evasive manner in which he gave the above answers indicates the signature to be that of Ram Chandra's. Lakshmi Kantha Talapatra, witness No. 1 for the applicant, who is one of the attesting witnesses and also Harish Bhowmik, also an attesting witness, were present at the marriage assembly—(vide deposition of Shama Charan Roy, witness No. 1 for the objector). These two men must be either relations or friends of the parties contracting the marriage, and it is not at all surprising that they should also be present at the time of the execution of Exhibit I and being present it is very likely that they should have been asked by Krishna Gopal to attest the deed. According to the applicant's case, Exhibit I was written by Abhoya Gobinda Chuckerbutty, who has been examined by him and according to the objector's case the *patra* that was executed was written by

Denabundhoo Chuckerbutty, who has not been examined by the objector, as it is alleged that he is dead. It again appears from the evidence of Lobit Mohan Talapatra that at the time of the execution of the *sambandha-nirnay patra* there were present Panchanan Talapatra, and Harish Bhowmik along with some other people. When the presence of these two men at the time of the execution of Exhibit I is admitted, there is no reason to suppose that they did not attest that document, when so asked. For the above reasons, we are of opinion that Exhibit I is the document that was executed as *sambandha-nirnay patra* by Ram Chandra.

The next point urged is that, conceding Exhibit I to be the *patra* executed by the deceased, it cannot operate as a will.

The definition of the expression "Will," as given in the Probate and Administration Act (V of 1881) and the Indian Succession Act, X of 1865, is "the legal declarations of the intentions of the testator with respect to his property, which he desires to be carried into effect after his death."

The important passage in Exhibit I, which corresponds with the above definition, is "and on the demise of me, and of my legally married wife he (Krishna Gopal) shall be entitled to, and be in possession of all the moveable and immoveable properties left by me." The above passage is a clear indication of the wishes of Ram Chandra with regard to such of his properties as may be left by him. It is contended on behalf of the applicant that Exhibit I is not in the form of a will, and that the form indicates that the document could not have been intended to be testamentary, and that the name of the document itself is against such a supposition. There is no doubt that the passage quoted above shows the testamentary wishes of the deceased. According to a very learned authority on Hindu Law, the form of the will is immaterial, Mayne on Hindu Law and Usage). Petitions addressed to officials or answers to official enquiries have been held to amount to wills: *Shumsool Hooda v. Shewukram* (1)

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Hurpurshad v. Sheo Dyal (1), *Kalian Singh v. Sanwal Singh* (2),
Haidar Ali v. Tasadduk Rasul Khan (3), *Balbhaddar Singh v.*
Sheonarain Singh (4).

No technical words are necessary for a will. The rule of construction in a Hindu as in an English will, is to try and find out the meaning of the testator, taking the whole of the document together, and to give effect to its meaning. In applying the above principle Courts of Justice in this country ought not to judge the language used by a Hindu, according to the artificial rules, which have been applied to the language of people, who live under a different system of law, and in a different state of society. In the case of *Ram Moni Dasi v. Ram Gopal Shaha* (5), it was held that a document, which contains directions regarding the executant's property after his death, which in certain circumstances may be revoked, is a will. A perusal of that case shows that the intentions of the testator in it were almost exactly the same as those of Ram Chandra in the present case. It was a case, in which the wishes of the testator were embodied in a document styled *niampatra* and *ekrar*. For the above reasons we hold that it is immaterial what the form of a document may be, but if it embodies the legal declarations of the intentions of the testator with respect to his property, which he desires to be carried into effect after his death, it is a will. We find that in this case the testator's desires, with regard to his properties that may be left after his and his wife's death, are fully expressed in the passage in Ex. I quoted above.

It is important to note here that Exhibit I does not specify the properties bequeathed, it only says that Krishna Gopal will be entitled to anything that might be left after the death of Ram Chandra and his wife. Ram Chandra could have dealt with the properties that he had in any manner he might have liked notwithstanding the execution of Exhibit

(1) (1876) L. R. 3 I. A. 259.

(3) (1890) I. L. R. 18 Calc. 1;

(2) (1884) I. L. R. 7 All. 163.

L. R. 17 I. A. 82.

(4) (1899) L. R. 26 I. A. 194.

(5) (1908) 12 C. W. N. 942.

I. If he could have so dealt with the properties, he could have made Exhibit I infructuous. This document which, as has been observed, is not addressed to Krishna Gopal, had no hindering effect on the testator; and he was therefore free to revoke it. That being so, the document in question operates as a will. We are supported in the view that we have taken, by the case of *Sita Koer v. Deonath Sahay* (1), where it was held that in ascertaining whether a document is a will one of the tests is to ascertain whether the document is revocable or not. The irrevocability of a document is perfectly inconsistent with its being a will. We have shown above that the document in question was revocable and we therefore hold that it is a will.

It has been contended on behalf of the appellant that at the time of the execution of Exhibit I, it was impossible to say whether Ram Chandra's wife was going to survive him or not, and in case of the survival of the wife, she was given, under the terms of Exhibit I, only a life-interest. But the fact that the legacy to Krishna Gopal was postponed, until the death of the testator's wife, does not make the document any the less a will. In this connection we may refer to *Ram Moni Dasi v. Ram Gopal Shaha* (2) already quoted, as well as to section 106 of the Indian Succession Act (X of 1865).

For the above reasons, we hold that the judgment of the learned District Judge is correct in holding that Exhibit I operates as a will.

We, therefore, dismiss this appeal with costs.

Appeal dismissed.

R. D. B.

(1) (1904) 8 C. W. N. 614.

(2) (1908) 12 C. W. N. 942.

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CRIMINAL REVISION.

Before Mr. Justice Rampini and Mr. Justice Sharfuddin

DASARATHI MAHAPATRA

v.

. RAGHU SAHU.*

Rioting—Common object of unlawful assembly—Necessity of express finding on the point by the Lower Courts in their judgments—Criminal Procedure Code (Act V of 1898) ss. 367 and 424—Indian Penal Code (Act XLV of 1860) ss. 141 and 147.

Where the common object of an unlawful assembly was stated in the charge to be to enforce a right or supposed right, and there was no dispute as to the common object in the lower Courts, which did not, therefore, discuss the question or come to any express finding in so many words on the point, it was held that they had impliedly found the common object of the assembly to be the same as stated in the charge, and that the accused had been in no way prejudiced.

Sabir v. Queen-Empress (1), Poreah Nath Sircor v. Emperor (2), distinguished.

CRIMINAL RULE.

THE complainant, Raghu Sahu, and some 10 or 12 other men, were cutting paddy on certain land, the possession of which was in dispute, when the petitioner came up to them and remonstrated, but finding them still reaping he called out his party who, about 30 in number, came up armed and attacked the complainant's party and wounded several of them. The accused were put on their trial before the Deputy Magistrate of Balasore under section 147 of the Penal Code. The common object laid in the charge was to enforce a right or supposed right to the land. The trying Court discussed only two questions, viz., as to the identity of the land as that of which the complainant's father-in-law had been put in possession by the Civil Court, and as to who was in possession. He found possession with the complainant, and convicted and sentenced the accused. An appeal from the conviction was dismissed.

* Criminal Revision No. 242 of 1903, against the order of B. C. Sen, District Magistrate of Balasore, dated the 27th of February 1903.

(1) (1894) I. L. R. 22 Cal. 276.

(2) (1905) I. L. R. 33 Cal. 295.

Neither Court alluded to the common object, and there was no express or specific finding on this point, no question having been raised as to it in either Court.

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Mr. Monnier (Babu Bidhu Bhusan Ganguli with him) for the petitioners. Before a conviction under section 147 of the Penal Code can be upheld there must be first a clear statement of the common object in the charge: *Behari Mahton v. Queen-Empress* (1), and next the common object must be expressly found by the lower Courts: *Sabir v. Queen-Empress* (2). If the judgment does not contain a finding as to the common object, the conviction is bad on that ground alone: *Poresh Nath Sircar v. Emperor* (3). [RAMPINI J. But what are the sections of the Code, which lay down the law in such terms] An assembly of five or more is only unlawful when animated by the one or the other of the five common objects set forth in section 141 of the Penal Code. It is, therefore, necessary to show in the charge that some such common object existed. The *Illustrations* to sections 221 and 223 of the Criminal Procedure Code indicate, that in the case of well known offences, which can be committed only in a limited number of ways, *e.g.*, murder or theft, it is not necessary to specify any particulars, but in cases like rioting, where the offence is made out only on the existence of certain common objects, the particular common object alleged must be stated in the charge. Next sections 367 and 424 of the Criminal Procedure Code require a statement of the points for determination and the decision thereon. In other words the judgments of the lower Courts must expressly contain all findings necessary to constitute the offence, and the common object must, therefore, be expressly found. Further the Assistant Settlement Officer found the petitioner in possession and the Magistrate should have followed the finding. He has also determined the question of possession on the merits.

(1) (1884) I. L. R. 11 Cal. 106.

(2) (1894) I. L. R. 22 Cal. 276.

(3) (1905) I. L. R. 33 Cal. 295.

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Babu Dasarathy Sanyal for the opposite party. No objection was taken to the common object in the Courts below. The ruling in *Poresh Nath Sircar v. Emperor* (1) is not opposed to me. In that case the common object was not even by implication found in the judgments of the lower Courts. Here there is such a finding. The decision of the Assistant Settlement Officer was not finally published at the time and could have no effect. The order of the Magistrate is also based on the oral evidence.

RAMPINI AND SHARFUDDIN JJ. This is a Rule to show cause why the conviction of, and sentences passed on, the accused should not be set aside. The accused have been convicted under section 147 of the Indian Penal Code of rioting, and sentenced to undergo rigorous imprisonment for a month and to pay a fine of Rs. 20. They have been found to have attacked the complainant and others, while cutting their paddy. The accused party were about 30 in number. This complainant was beaten and wounded and taken to the thana in a *dhuli*.

The main question debated in the lower Courts was as to the possession of the land. Both the Courts below found that the complainant had been in possession of the land since 1905. His predecessor-in-interest, that is, his father-in-law, had obtained a decree in the Civil Court and had been put in possession of the land by the Civil Court, and an under-riyat, named Shibo Jana, who had been in actual possession till then, had gone out, and the complainant's father-in-law and the complainant had been ever since in direct possession and cultivation. The accused, had, therefore, no possible right to interfere with the complainant when cutting the paddy. They have been rightly convicted of an offence under section 147 of the Indian Penal Code.

The learned Counsel for the petitioner impugns the conviction on technical grounds, the principal of which is that there is no finding in the judgments of the lower Courts as to the common object of the unlawful assembly. He relies on the rulings in the cases of *Sabir v. Queen-Empress* (1) and *Poresh Nath Sircar v. Emperor* (2) as authorities for holding that this is essential. The charge in this case was, however, properly drawn. The common object was therein stated to be to enforce a right or supposed right. Now there was no contest in either of the lower Courts as to the common object. Nobody ever contended that the common object of the assembly, if any, was not to enforce a right or supposed right. The lower Courts have, therefore, not discussed this question, and have come to no express finding, couched in so many words, on this point, but it is clear that they both impliedly have found that the common object of the unlawful assembly was as stated in the charge.

In the case of *Sabir v. Queen Empress* (1) it is only said that "there should be a clear (not an express) finding as to the common object," and the reason for that expression of opinion was that in that case there were two possible common objects of the assembly, and it was not apparent which of them had been accepted by the Judge and the Jury. In the case of *Poresh Nath Sircar v. Emperor* (2), according to Mr. Justice Mookerjee, the judgment of the Magistrate contained no finding what the common object of the assembly was, and the facts found by the Sessions Judge completely negatived the common object set out in the charge, which, it is pointed out, was not stated with due precision. The accused were, therefore, held to have been prejudiced. The facts of the present case are very different. As has been already explained, there is no defect in the charge. It was never contended that the common object of the assembly was or could be other than that set out in the charge. No plea on the point was raised in

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who, relying on a note in Prinsep's Criminal Procedure Code (14th Edition), page 552, disallowed the claim. The inquiring Magistrate then gave the petitioner time to apply to the High Court for a transfer.

Mr. Godfrey (Babu Haroprasad Chatterjee with him) for the petitioner. The word "inquiry" in section 443 of the Code includes an inquiry under section 107 of the Code. The word "charge" is not used in the former section in the restricted sense of the formal charge, which a Magistrate draws up in cases of offences, but in the wider sense of an *accusation*. It is submitted that Sir Henry Prinsep's note to section 443 to the contrary is not correct.

SHARFUDDIN AND COXE JJ. This is a Rule on the District Magistrate of Mozufferpore to show cause why the case should not be transferred from the file of the trying Magistrate to that of any other Magistrate competent to try the same, on the ground that the trying Magistrate had no jurisdiction to inquire into the matter under section 443 of the Criminal Procedure Code.

Under section 443 of the Criminal Procedure Code no Magistrate, unless he is a Justice of the Peace, and (except in the case of a District Magistrate or Presidency Magistrate) unless he is a Magistrate of the first class and a European British subject, shall inquire into or try any charge against a European British subject.

From the Explanation submitted by the Magistrate there is nothing to show that the petitioner is not a European British-born subject, and we are told that the matter was not at all disputed. The question is whether the expression "inquire into or try any charge" applies to proceedings under section 107 or not.

The party, against whom proceedings under section 107 of the Criminal Procedure Code are instituted, is in the position of an accused party, and when he is bound over to keep the peace, his liberty is, to a very great extent, qualified. In

Queen-Empress v. Mutasaddi Lal (1), it was held that a person, against whom proceedings under Chapter VIII of the Code of Criminal Procedure are being taken, is an "accused person" within the meaning of section 437 of the Code. It appears from this case that the learned Judge, who tried it, followed *Queen-Empress v. Mona Puna* (2), and *Jhoja Singh v. Queen-Empress* (3).

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If, therefore, the petitioner is an accused person, his case certainly comes under section 443 of the Criminal Procedure Code and, as a European British-born subject, is entitled to claim that he should be tried by a Justice of the Peace or a District Magistrate or Presidency Magistrate, provided the Justice of the Peace is a Magistrate of the first class and a European British-born subject.

In the above circumstances we make the Rule absolute, and direct that the District Magistrate do transfer the case to any Magistrate competent to try the petitioner.

Rule absolute.

E. H. M.

- (1) (1898) I. L. R. 21 All. 107. (2) (1892) I. L. R. 16 Bom. 561.
(3) (1896) I. L. R. 23 Cal. 493.

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In the above circumstances we make the Rule absolute, and direct that the District Magistrate do transfer the case to any Magistrate competent to try the petitioner.

Rule absolute.

E. H. M.

- (1) (1898) I. L. R. 21 All. 107. (2) (1892) I. L. R. 16 Bom. 661.
 (3) (1896) I. L. R. 23 Calc. 493.

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Before Mr. Justice Sharfuddin and Mr. Justice Cox.

NARENDRA LAL KHAN

v.

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Bail, grounds for granting or refusing—Remand to custody—Criminal Procedure Code (Act V of 1898) ss. 344, 497 and 498.

In exercising its discretion under section 498 of the Criminal Procedure Code the High Court should not confine its attention to the question whether the prisoner is likely to abscond or not. Other circumstances also may affect the question of granting bail to accused persons charged with crimes of a grave character.

If a person is accused before a Magistrate of a non-bailable offence then, unless he considers that there are no reasonable grounds for believing him to be guilty, Magistrate must refuse bail, though he may be certain that the accused will stand his trial.

It is the right of an accused to demand that the charges against him should be tried without any unreasonable delay, and such delay will dispose the High Court to grant bail.

Where a police officer of superior rank deposed that he had evidence, which he believed, implicating the accused, and swore also to the truth of the first information, which alleged association of the accused in certain places and stated that the police had in their possession incriminating correspondence between the accused and a secret society in Calcutta, it was held that there was sufficient evidence for a remand under section 344 of the Code, but that there had been unreasonable delay as regards the prisoners, who had been in custody for about six weeks, though not in the case of those who were in jail for three weeks.

On the 8th July 1908 the house of one Peary Mohun Das of Midnapore was searched by the police and a bomb found. Santosh Chandra Das, the son of Peary Mohun, was arrested, in consequence, under the Explosive Substances Act (VI of 1908), and placed before the Joint Magistrate on the next day, and remanded to custody till the 23rd, on which date and after he was again remanded, without being brought before the Magistrate, to the 7th and 21st August. In the meanwhile he made a confession to the Magistrate on the 29th July. On the 31st

* Criminal Revision Miscellaneous No. 134 of 1908, against the order of J. Bryne, Offg. Sessions Judge of Midnapore, dated the 12th September 1908.

July a bomb was found in the record room of two persons, named Baroda Prosad Dutt and Saroda Prosad Dutt and another in a drain belonging to the premises, and these two with six others were thereupon arrested and taken before the Magistrate on the 1st August, and remanded to the 15th instant, on which date one of them, Surendra Nath Mukerjee, made a confession before a Deputy Magistrate implicating a large number of persons in Midnapore. This batch of accused was then remanded to the 31st instant.

On the 26th August Mazharul Huq, a Deputy Superintendent of Police at Midnapore, sent in a police report to the Joint Magistrate praying for search and arrest warrants, under sections 4, 5 and 6 of the Explosive Substances Act, against the Raja of Narajole and 19 others, residents of Midnapore. Upon receipt of this report the Magistrate, professing to act upon it and the two recorded confessions, issued the warrants. The houses of the Raja and of 17 others were searched on the 28th, and they were arrested and put up before the Magistrate on the next day and remanded till the 7th September. On the 31st August Santosh and Surendra retracted their confessions, alleging that they had been obtained by police ill-treatment. The deposition of Lal Mobun Guha, a local Inspector of Police, was taken on the same day. He proved the finding of the bombs, and stated that his inquiries showed that the accused, who were then in the dock, except three, were members of a conspiracy for the manufacture of bombs to kill Europeans.

On the 7th September all the accused were placed together before the Joint Magistrate. A first information report was filed by Mazharul Huq alleging that the accused were members of a secret society operating at various places in Midnapore and elsewhere, having as one of its objects the assassination by bombs of Mr. Weston, the District Magistrate of Midnapore. It was further stated in the report that the police had seized incriminating correspondence connecting the accused with a secret society in Calcutta. Santosh and Surendra repeated the retraction of their confessions on the 8th September. Lal Mobun Guha was examined on the same

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date, and stated that his inquiry had put him in possession of information, which he believed to be trustworthy, that the offences charged in the first information were committed by the accused. On the same day Mazharul Huq deposed to the same effect and also to the correctness of the first information. The accused applied for bail to the Magistrate, but it was refused the next day, as he found that there were reasonable grounds for believing that each accused was guilty of the offences charged. The case was then postponed to the 23rd instant.

The accused thereafter renewed their application for bail before the Sessions Judge contending that, as the confessions had been retracted, there was no evidence against them. The Judge declined to grant bail on the ground that two police officers had deposed that there was further evidence, the character of which the Magistrate was aware of, and that the period of custody of most of the accused was not unduly long having regard to the nature of a case of conspiracy. Against this order the accused moved the High Court.

Mr. P. L. Roy (Mr. Keays, Mr. Khodabux and Babu Joy Gopal Ghose with him) for the Raja of Narajolo. The Raja is a wealthy man and has a large stake in the interest of order. He was arrested on the 28th and placed before the Magistrate the next day. There has been no evidence recorded to prove the guilt of the petitioner except the statements of two police officers that they have further evidence. This may be sufficient for a first, but not for an indefinite, remand. There can be no doubt that the Raja will appear and stand his trial. Under section 498 of the Code the Sessions Judge and the High Court have an unlimited discretion in the matter of granting bail. The main principle in considering the question of bail is whether the accused will stand his trial or abscond. Refers to *In re Barronet* (1), *Reg v. Scatfe* (2), *In re Johur Mull* (3). The Raja is willing to stay in his own house at Midnapore under a police guard.

(1) (1852) 1 El. & B. 1. (2) (1841) 9 Dowl. 553.
(3) (1906) 10 C. W. N. 1093.

Mr. Dutt (*Mr. Godfrey* and *Babu Peary Mohun Dass* with him) for Santosh and six others. As regards Santosh the case against him was complete on the 8th July, and he ought to have been brought before the Magistrate. There is no evidence against the others.

Mr. Chuckerbutty (*Mr. K. N. Chowdhry*, *Mr. A. N. Chowdhry* and *Babu Monmotho Nath Mookerjee*) for Upendra Nath Maiti and others. The principal matter a Court has to consider in such cases is the possibility of the accused absconding. These accused are gentlemen of position, and they would not absent themselves. There is no evidence against them.

Mr. K. N. Chowdhry (*Mr. A. N. Chowdhry* and *Babu Monmotho Nath Mookerjee* with him) for Khagendra Nath Banerjee. There is nothing against this accused in the evidence.

Mr. Mullick (*Mr. Dutt* and *Babu Peary Mohun Dass* with him) for Baroda Prasad Dutt and others adopted the same line of argument.

Mr. Baxter for the Crown. Santosh has been a considerable time in custody, but a bomb was found in his house and he has confessed. A case of conspiracy by being members of a secret society must take a long time to unravel. The question is whether there has been an unreasonable delay. The real remand was on the 9th September. Arrangements had to be made to have the cases tried together. The question is whether *prima facie* there is no reason to believe the accused guilty. Refers to the first information. The charge is not only with respect to the finding of the bombs, but also that there is a secret society in Madras, one of the objects of which is to kill Mr. Weston. The case of *In re Barronet* (1) is in my favour. *In re Johur Mull* (2) is distinguishable. The only question is not whether the accused will appear at the trial. The charges are very serious. The retracted confessions are admissible against the persons making them. *Queen-Empress v. Raman* (3), and, if corroborated strongly, also against the others: *Yasin v. King-Emperor* (4). The investigation was

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(1) (1852) 1 EL. & BL. 1.

(2) (1906) 10 G. W. N. 1093.

(3) (1897) 1 L. R. 21 Mad 83.

(4) (1901) 1 L. R. 28 Cal. 680

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not completed on the day of the last remand. The case will be ready by the 23rd September.

SHARFUDDIN AND COXE JJ. The petitioners in these cases are accused of offences under the new Explosives Act, 1908. The offences which they are alleged to have committed are non-bailable. They were arrested on warrants and after arrest were produced before the Magistrate, who committed them to jail pending trial. Applications for bail have been made to the Magistrate and the Sessions Judge and refused. They now apply to this Court for bail.

It has been strongly pressed upon us on their behalf that these persons are not likely to abscond, and certain English authorities have been cited which lay down the principles on which bail is granted in that country.

We are not prepared, however, to agree that the decisions of English Courts are necessarily a safe guide to us in interpreting sections of our own Code, and we observe that the cases cited refer to offences of much less gravity than those of which the present petitioners are accused. We doubt very much if English Judges would lend a ready ear to applications for bail on behalf of persons accused of offences of the gravity indicated in the papers before us. Nor are we prepared to admit that, in exercising our discretion under section 498 of the Criminal Procedure Code, we should confine our attention to the question whether the prisoner is or is not likely to abscond, as other circumstances may also affect the question of granting bail to persons accused of having committed crimes of a grave and serious nature. If a person is accused before a Magistrate of a non-bailable offence then, unless he considers that there are no reasonable grounds for believing him to be guilty, the Magistrate must refuse bail, no matter how certain he may be that the accused will appear to stand his trial. The Magistrate is probably in a better position than the Sessions Judge, and almost certainly in a better position than the High Court, to estimate the probability of the prisoners absconding.

It is illogical to suppose that the Legislature intended that the Sessions Judge and the High Court, in dealing with questions of bail, should be guided exclusively by a consideration, which the officer best qualified to estimate its value is debarred from referring to at all.

It is the right of an accused person to demand that the charge against him should be tried without any unreasonable delay, and such delay will certainly dispose this Court to grant bail. With respect to the bulk of the petitioners we are not prepared to say that the delay in proceeding against them has been unreasonable. They were arrested at the end of August, and it is now but little past the middle of September. We believe it is not at all unusual that a period of this extent should elapse between the arrest of persons accused of grave and serious crime and the commencement of the trial. In the case of offences under section 400 of the Indian Penal Code, which, so far as the difficulty of investigation goes, bear some analogy to the present case, which appears to be based to some extent on evidence of association, the period is usually far greater. Under section 167 of the Criminal Procedure Code a Magistrate, on the mere perusal of the entries in the police diaries relating to the case, to which of course the accused have no right of access, may from time to time authorise the detention of the accused in custody for a term not exceeding 15 days on the whole. Thereafter he can, under section 344 of the Criminal Procedure Code, by a warrant remand an accused for any term not exceeding 15 days at a time, if sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence and it appears likely that further evidence may be obtained by such remand. The evidence in this case is, in our opinion, sufficient to raise such a suspicion. A Police officer of superior rank has been examined and swears that he has evidence which, as he believes, implicates the accused. He swears also to the truth of the first information which sets out that the accused in the present case associate together in certain specified places, and that there is in the possession

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of the police incriminating correspondence connecting them with a secret society in Calcutta. We think that there are good reasons for believing that such evidence exists against all the accused persons. This evidence may be good or bad, but we do not think that its production can be said, as against the majority of the accused, to have been unreasonably delayed. We are assured by learned counsel for the Crown that the case will be taken up in earnest on the 23rd instant without fail, and if it is not taken up, which we do not at all anticipate, it will be open to the accused to renew their applications. In these circumstances we decline to grant bail to the majority of the petitioners.

But as regards the accused Maddhu Sudhan Dutt, Sham Lal Shaha, Saroda Prosad Dutt, Baroda Prosad, Nikunja Behari Maiti, we think the evidence of their complicity has been unreasonably delayed. They were arrested at the end of July and have been six weeks in custody, and evidence against them might, in our opinion, have been produced in addition to what has been before us. We grant their applications and direct that they be released on bail to the satisfaction of the District Magistrate. Another man who has been confined for a long time is Santosh, but in his case, bail is out of the question.

As regards Raja Narendra Lal Khan it is stated in the affidavit on his behalf that he has been delicately nurtured, and the deprivation of his customary food is prejudicial to his health. He states that he is willing to submit to conditions. It is perhaps a greater hardship on a man of position, brought up in luxury and holding a high position in society, to be subjected to jail rules than it is to men who have to make their way in the world. In the absence, as yet, of convincing direct evidence, we are willing to yield to this petitioner's request. He may be released on bail to the satisfaction of the District Magistrate on condition of his being guarded at his own house and debarred from all communications with persons said, rightly or wrongly, to be his associates in crime.

Of course it must be understood that these orders do not affect the right of the Magistrate hereafter on sworn testimony given before him, which in his opinion establishes a *prima facie* case against any or all the persons now released, to commit him or them again to custody. The applications of all but the above mentioned six persons are refused.

* H. M.

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CRIMINAL REVISION.

Before Mr. Justice Mitra and Mr. Justice Gaze.

JAMINI MULLICK

v.

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Bail, grounds for grant or refusal of—Remand to custody—Reasonable evidence of prisoner's guilt—Criminal Procedure Code (Act V of 1898) ss 344, 497 and 498.

Held per Mitra J (Coxe J, dissentie,) that the main question for consideration in determining matters of bail is whether there are reasonable grounds for believing the accused guilty of the offences charged. Other considerations must also arise in deciding this question, and one of these, which has always guided English and Indian Courts, is whether there are any grounds for supposing that the accused would abscond.

Under section 497 of the Criminal Procedure Code an accused should ordinarily be released on substantial bail until reasonable grounds are made out for presuming his guilt. *In re Johur Mull* (1), followed.

If after a remand incriminating evidence is not adduced, and if the prosecution has already had sufficient time to adduce such evidence, the Court will reasonably conclude that such evidence is not forthcoming at the time. It should then under section 497, sub-section (2), release the accused on bail, whatever be the nature of the offence, though the preliminary enquiry should proceed. *Manikam Mudali v. Queen* (2), followed.

Whether there are reasonable grounds or not must be decided judicially, that is to say, there should be some tangible evidence on the record on which, if unrebutted, the Court can conclude that the accused might be convicted. The statement by a witness that he has seen a certain act of an incriminating character done by the accused might be sufficient. But if there be no evidence whatsoever, or evidence of a very flimsy character on the face of it, the inference will be, after a reasonable time has elapsed since the beginning of the enquiry, that there are no reasonable grounds for supposing the accused to be guilty. The prosecution must, however, have a fair opportunity of adducing evidence of a really incriminating nature. At all events, the first information report should indicate with sufficient exactness, the character of the evidence likely to be forthcoming.

The detention of an accused under trial is not intended to be penal, but its object is to secure attendance. The gravity of the offence and some evidence of its perpetration by the accused will, however, justify detention.

* Criminal Revision Miscellaneous Nos. 140, 141, and 142 of 1909, against the order of C. H. Reid, Joint Magistrate of Midnapore, dated the 26th September 1903.

(1) (1906) 10 C. W. N. 1003.

(2) (1882) 7 L. R. 8 Mad. 53.

THE facts of this case down to the order of the High Court (SHARFUDDIN and COX JJ.), dated 18th September, made in the case of *Narendra Lal Khan v. Emperor* (1), are fully stated in the report of that decision. The case when it went back to the Magistrate was taken up by him on the 23rd, 24th and 26th September. He examined the Joint Magistrate, who proved the issue of search warrants and the voluntariness of the confessions of Santosh Chandra Das and Surendra Nath Mukerjee. The Deputy Magistrate, who recorded the confession of the latter, was also called to prove that it was made voluntarily. The Jail Superintendent was then examined to establish that neither Santosh nor Surendra had made any complaints of ill-treatment by the police. The last witness was a kanungoo, who made the plans of the houses of Santosh and Baroda Prosad Dutt. The reports of the Chemical Examiner were also put in as evidence.

Applications for bail were made to the Magistrate but, except in the case of two, they were refused, and the case was remanded till the 19th October. The accused then moved the High Court for bail.

Mr. Dutt (Mr. Morrison, Mr. Mullick, Babu Monmotho Nath Mookerjee and Babu Peary Lal Ghose) for the petitioners, except Abinash Chandra Mitter. The whole matter turns upon the question, whether there is any ground for believing that the accused are guilty. If there is none, they are entitled to bail: *In re Johur Mull* (2). There are only the retracted confessions, but no further evidence. Refers to *Manikam Mudali v. Queen* (3). The prosecution has even failed to file a list of witnesses under sealed cover.

Mr. Morrison for Abinash Chandra. Upon the question of bail there must be a judicial belief in the guilt of an accused. Some *prima facie* case must be made out. The only evidence is the report and an expression of opinion by two police officers. The prosecution is even now unable to produce incriminating evidence.

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(1) ante p. 166

(2) (1906) 10 C. W. N. 1093.

(3) (1882) 1 L. R. 6 Mad. 63.

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Babu Hemendro Nath Mitter for the Crown. In the previous stage of the case (1) the High Court decided that there was sufficient evidence for a remand, and the only point is whether the case has been taken up in earnest. The prosecution intended to put in a list of witnesses at the next hearing. The only question here is whether there were reasonable grounds for the belief in the guilt of the accused. The Magistrate had before him the police report, the first information and the deposition of the police officers that there was evidence, which they believed to be credible, against the accused, apart from the retracted confessions.

MITRA J. There are four sets of petitioners before us. The first petition has been presented on behalf of Jamini Mullick and five others, the second on behalf of Akhil Chandra Sarkar and nine others, the third on behalf of Santosh Chandra Dass and Surendra Nath Mukerjee and the fourth on behalf of Abinash Chandra Mitter. The applications purport to be under section 497, read with section 498, of the Criminal Procedure Code.

A preliminary inquiry is now going on in the Court of the Joint Magistrate at Midnapore. The proceedings against most of the petitioners commenced practically on the 28th August 1908, but Santosh and Surendra had been arrested in July. All the petitioners have since then been in custody. Santosh and Surendra had been in custody from July. The offences with which they have been charged are non-bailable and undoubtedly of a very serious nature.

On the 7th September, the case came on before the Joint Magistrate, and there was a remand. The preliminary enquiry was commenced on the 23rd September, and witnesses were examined on that day and on the 24th and 26th September. The evidence that these witnesses gave was mostly such as would go only against Santosh and Surendra.

Very little evidence was adduced against the others during these days. On the 26th the enquiry was adjourned to the 19th October, and on the same day, the 26th, applications were made on behalf of the petitioners to be released on bail. The trying Magistrate, however, was of opinion that there were reasonable grounds for holding that the petitioners were guilty of the offences charged, and he, therefore, did not exercise the powers conferred on him by section 497 of the Criminal Procedure Code.

The petitioners have come up before us, and under section 498 of the Code we have concurrent jurisdiction with that of a trying Magistrate and not merely revisional jurisdiction.

The main question we have to consider in connection with these petitions is—are there reasonable grounds for believing that the petitioners are guilty of the offences of which they have been accused? Other considerations must also arise in deciding the question of releasing the accused on bail, and one of these, which has always guided Courts of Justice, both in England and India, is whether there are any grounds for supposing that the accused, if released on bail, would abscond and attempt to escape justice by avoiding or delaying an inquiry or trial. It is not necessary for me to state here at length the grounds on which bail ought to be granted or refused under section 497 of the Criminal Procedure Code. In one of the reported cases in India, *In re Johur Mull* (1), I expressed an opinion as to the matters, which a Court should consider, in deciding the question of granting or refusing bail. I was of opinion (and my learned brother Ormond J. agreed with me) that an accused might ordinarily be released on substantial bail, until reasonable grounds were made out for presuming his guilt. The words of sub-section (1) of section 497 would lead to his conclusion. To quote some of the words of the section “he (the accused) shall not be so released, if there appear reasonable grounds for believing that he has been guilty of the offence, of which he is accused.” Sub-section (2) of section 497 has

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unsubstantial character. It seems that some of these persons are not men of very good position. I am not, however, prepared to make a distinction between persons of very good position and those not of such position, if they can satisfy the Magistrate as to substantial bail with two sureties each.

As regards the third set of petitioners, Santosh Chandra Dass and Surendra Nath Mukerji, there is evidence against them as they made confessions incriminating themselves. They might have retracted their confessions; but the confessions are evidence against themselves. I cannot say there is reasonable ground for believing that they are not guilty. It might be that subsequent evidence would go to prove that they are really guilty. No case has been made out by them for release on bail, and their petition is, therefore, rejected.

The fourth petition is by Ahinash Chandra Mitter. The affidavit shows that he is a gentleman of position, and, so far as evidence has been recorded, there is very little against him. I am of opinion that he also should be released on bail with two sureties, the amount of the bail also being of a substantial character.

As there has been a difference of opinion between my learned brother and myself, under section 36 of the Letters Patent of 1865, the opinion of the Senior Judge should prevail. The order of the Court, therefore, is that contained in my judgment.

COXE J. In this case I have the misfortune to be unable to agree with my learned brother.

When these applications came up about a fortnight ago the Bench of this Court, of which I was a member, held that there was sufficient justification for detaining the accused in custody, provided that the case was taken up in earnest on the 23rd September. To that decision I adhere, and it does not seem to me that we ought now to review that order or to consider again whether there is sufficient justification for detaining the accused.

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All that seems to me to be now open to discussion is whether the case has or has not been taken up in earnest. A special difficulty has arisen in this case for which the prosecution is not responsible, namely, that the Magistrate's Court is necessarily closed for the annual vacation. This occurrence does not seem to me, however, to give the accused any right to bail, which otherwise they would not have had.

Turning then to the question whether the case was taken up in earnest, I find no complaint in the petition that the Magistrate took less than the available time in dealing with the case. Four witnesses were examined, and the evidence was directed to a point certainly not of a formal nature but of very considerable importance to some of the accused, namely, whether the confessions made by them were voluntary or not. These accused persons are among the present applicants, but certainly they can have no cause for complaint that the case has not been duly proceeded with as against them.

It is pleaded strenuously on behalf of the others that this evidence is of no value against those others. This may be so, but I do not think that a case can be divided up in that way or that other accused persons are entitled to bail, while evidence against some of them is being taken. The case must be proceeded with in some order: and if evidence has been given against some of the accused, it cannot reasonably be said that the case has not been taken up in earnest against the others. I think the case was taken up in earnest, and that these applications should be refused.

In conclusion I would refer to one point, namely, that the remand being until the 19th October is for a period in excess of that allowed by law. On this the Magistrate points out: "The date to which the case is adjourned is the seventh open day after the Puja vacation. The first few open days are always a busy time, and as I shall myself be in Midnapore during the vacation, I expect to be absent for a few days after its close. No objection has been taken to the date fixed, in fact one counsel for the defence suggested it as a suitable date."

Having regard to this remark, I do not think that we should interfere in this matter because the remand is not strictly in accordance with the provisions of section 344.

I would, therefore, refuse these applications.

E. H. M.

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APPELLATE CIVIL.

Hijore Mr. Justice Stephen and Mr. Justice Doss.

FUL CHAND

v.

NAZAB ALI CHOWDHURY.*

Mahomedan Law—Divorce—Talak—Dower, suit for—Limitation.

Under the Mahomedan Law, absence of the wife does not make the pronouncement of *talak* void and inefficacious.

Furzund Hossain v. Janu Bibi (1) and *Sarabai v. Rabiabai* (2), referred to and discussed.

SECOND APPEAL by the plaintiff, Ful Chand Bibi.

The plaintiff's allegation was that she married one Mosad Chowdhury in 1294 B.S. (1897), and that a registered *kabin* was executed by the husband, under which the deferred portion of the dower had not been paid, and became due, at the death of Mosad in the month of Assin last.

The defendants, the heirs, alleged to be in the enjoyment of the property left by the late Mosad Chowdhury, denied the liability and alleged that the plaintiff fled from her husband's house in 1304 B.S., and was thereupon divorced, on the following day by her husband, and that the father of the plaintiff appeared and agreed verbally to relinquish the claim for the deferred portion of the dower; that the plaintiff had never since lived with her husband; and that they had inherited no property from Mosad and so were not liable for any dower. The defendants further contended that the divorce having taken place in 1304, the claim for dower was barred by limitation, as it had not been claimed within the statutory period of three years.

The plaintiff filed her plaint on the 15th of February, 1905.

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(1) (1878) I. L. R. 4 Calc. 593.

(2) (1905) I. L. R. 30 Bom. 537.

The Court of first instance decreed the suit on the grounds that the *kabin* produced was not disputed by the defendants, and that the story of *talak* and relinquishment was not worthy of credit, because the plaintiff herself was not present at the meeting, in which Mosad Chowdhury was said to have divorced his wife; and that the father had no right to relinquish the dower on behalf of his daughter, who was of full age.

The Additional District Judge, on appeal, held that the plaintiff was divorced in 1304, (1897), and that her right to sue for the dower was therefore barred by limitation; and he accordingly allowed the appeal and dismissed the plaintiff's suit with costs.

The plaintiff appealed to the High Court mainly on the ground that the *talak* having been pronounced in the absence of the wife, the Court below ought to have held that there was no valid divorce under the Mahomedan Law, and that consequently the suit was not barred by limitation.

Babu Bepin Chandra Mallik (with him *Babu Tarakishore Chowdhury*), for the appellant. The main point in the case is whether a divorce can be effected under the Mahomedan Law by uttering the *talak* in the absence of the wife. Sir Roland Wilson in his Digest of Anglo-Muhammadian Law says that "a divorce may be accomplished by the utterance of any words addressed to the wife clearly indicating an intention to dissolve the marriage"; that shows that the wife must be present. see also Bailie's Digest of Mahomedan Law, page 201. The case of *Furzund Hossein v Janu Bibi* (1) is an authority in my favour. [STEPHEN J. If the wife runs away what is the husband to do?] He can send her a written divorce. It must be remembered that divorce does not extinguish the right to a deferred dower; it only makes the limitation for an action for dower run from the date when the *talak* is pronounced.

Moulvi Shamsul Huda (with him *Moulvi Nuruddin Ahmed*), for the respondents. The presence of the wife is not necessary,

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when *talak* is pronounced. The absence of the wife only requires that her maintenance is to be paid, until the fact of divorce comes to her knowledge: see Ameer Ali on Mahomedan Law, page 452. The case of *Sherif Saib v. Uzana Bibi Ammal* (1) is also in my favour. See also Ballie on Mahomedan Law, page 205.

Babu Bepin Chandra Mallik, in reply. Even, on the assumption that divorce could be effected in the absence of the wife, still as it could not affect the recovery of dower, till it came to the knowledge of the wife, this case should be remanded for a finding whether the wife came to know of it before the period of limitation. The *onus* as to that is upon the defendants, and there is no finding as to the time when the pronouncement of *talak* came to the knowledge of the plaintiff.

STEPHEN AND DOSS JJ. This is a suit in which a woman sues the heirs of a deceased Mahomedan for the deferred portion of the *moharana* provided for by a *kabinnamah*. The defence to the suit was that the woman was divorced in 1304 B.S. or 1897, and that the cause of action accrued at the time of her divorce and that she is therefore Statute-barred under Article 104 of the Limitation Act. To this it is answered that, admitting the facts found by the lower Appellate Court, still no divorce took place. The divorce was by *talak* being pronounced three times, but it was pronounced in the absence of the wife though in the presence of various witnesses including the wife's father.

The first question, which we have to decide, is whether the absence of the wife makes the pronouncement of the *talak* void and inefficacious. In our opinion it does not. The point is dealt with in the book of Mr. Ameer Ali in section 3 of Chapter XII, where he says:—"It is not necessary for the husband himself to pronounce *talak* in the presence of the wife,

but it is necessary that it should come to her knowledge." The matter is also dealt with in Wilson's Digest at page 164, but not so decisively. It also seems to be the opinion expressed in Nawab Abdur Rahman's Institutes of Mussalman Law. The matter has twice, as far as we are aware, been dealt with by the Courts; in the first place, in the case of *Furzund Hossein v. Janu Bibi* (1) and, secondly, in the case of *Sarabai v. Rabiabai* (2). In the second of these cases a distinct opinion is expressed that it is not necessary for the wife to be present, when the *talak* is pronounced, although this is an *obiter* inasmuch as that case dealt with a written instrument of divorce. In the previous Calcutta case, the matter is also dealt with and the point itself is not directly noticed, but *talak* was there pronounced in the absence of the wife, and it is significant that the case is not decided on that point, which it would have been, if it had been fatal to the effect of the divorce. We therefore hold that it is not necessary for the wife to be present when the *talak* is pronounced. It is necessary certainly for the purpose of dower that the fact of the pronouncement of *talak* should come to her notice. That it came to the notice of the woman there can be no doubt, for before her husband's death she saw him and claimed the dower.

This, however, leads us to the second question as to whether or not the present suit is barred by limitation. The *talak*, as we have said, was pronounced in 1897. The suit was brought in 1905 and the husband died a few months only before the suit. If we count the period of limitation from the time of divorce or from a little later, it is obvious that the suit is Statute-barr'd. Now, the findings are that the *talak* was pronounced in the presence of witnesses including the woman's father, who took or purported to take a leading part in the proceedings as representing the woman, and the findings also go to show that the woman has been living with her father, apparently continuously, since the time of the divorce. This particular question, when the woman got

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(1) (1878) I. L. R. 4 Calc. 588.

(2) (1905) I. L. R. 30 Bom. 537.

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158 of the Codo of Civil Proceduro, take further evidence and decide the case on that evidence. But after roading the decision wo do not think that this conclusion follows neces- sarily from the terms of the judgment. We think, therefore, that the first point fails, and hold that tho order of the 5th March 1907 was passed under section 100 read with section 157 of the Civil Procedure Code, and could be set aside by an application under section 108.

The second point taken is that the order of the Munsif re- viving the case is bad under section 108 of the Code of Civil Procedure, inasmuch as the Munsif has not found that the de- fendants were prevented by sufficient cause from appearing on the day fixed. It is impossihle to deny that the enquiry made by tho Munsif into the matter was perfunctory and the order passed very defective and irregular in form. But it appears on examining the proceedings that that order was an *ex parte* order. The case under section 108 was taken up on the 20th Fehruary, 21st March and the 11th April. On none of these days were the plaintiffs ready to proceed with the case. The order of the 21st March directed the issue of summonses on the plaintiffs' witnesses at their own risk and so conveyed to them a fair warning that further time would not be given. Then on the 11th April the plaintiffs applied for further time and their application being refused, one of the defendants was examined. The plaintiffs apparently did not cross-examine him and acting on the statement of one of the defendants that he had never heard of the decree, until it was exe- cuted, the Munsiff directed the restoration of the suit and a trial *de novo*. Although, as we have said, we cannot re- gard the order of the Munsif as in form a proper order, yet we do not think that we ought, in the exercise of the discretion given us by section 622 of the Code of Civil Procedure, to interfere with it.

The result is that this Rule is discharged with costs.

Rule discharged.



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Act XIII of 1889 (Cantonments), as modified up to 1st March 1890 ...	9	7	0	[1a.]
Act XV of 1889 (Official Secrets), as modified up to 1st April 1904 ...	0	3	0	[1a.]
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III.—ACTS AND REGULATIONS OF THE GOVERNOR-GENERAL OF INDIA IN COUNCIL AS ORIGINALLY PASSED.

- Acts (unrepealed) of the Governor-General of India in Council from 1854 to 1908.
 Regulations made under the Statute, 33 Vict., Cap. 3 from No. II of 1875 to 1908. 8vo, Stitched.

[The above may be obtained separately. The price is noted on each.]

V.—TRANSLATION OF ACTS AND REGULATIONS OF THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

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A Digest of the Statutes and Acts relating to Merchant Shipping in India, Edition, 1884. By T. A. PRANSON, Barrister-at-Law...					5	0	0 [12a.]
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ACT 1882—XIV : See CIVIL PROCEDURE CODE.

ACT 1898—V : See CRIMINAL PROCEDURE CODE.

ACTIONABLE CLAIM : See ASSIGNMENT 345

AGREEMENT : See CONTRACT 354

APPEAL, ADMISSION OF—*Hearing on date of filing—Pleader—Right to be heard—Practice in the mofussil—Criminal Procedure Code (Act V of 1898), s. 421* A pleader for an appellant should not be called upon, immediately on the filing of an appeal, to support it, but should be afforded a reasonable opportunity of being heard. If the appeal is not admitted at once, and the Court desires to hear the appellant,

fail appeals.

RAMTOLAL DUSADH v. EMPEROR (1907) I. L. R. 36 Calc. 385

ARBITRATION—*Bengal Chamber of Commerce, arbitration by—Rules—Umpire, appointment of—Effect of failure to appoint* The rules relating to arbitration under the Bengal Chamber of Commerce contemplate the appointment of an Umpire before the Arbitrators enter upon the reference, and not upon a disagreement between them. Where the terms of a reference provide for the appointment of an Umpire before the Arbitrators enter upon the reference, until the Umpire is appointed, the reference cannot proceed. *Bright v. Durnell*, 4 Dow 756; *Bates v. Townley*, 1 Ex. 572, followed.

CHOONI LAL v. MADHORAM (1908) I. L. R. 36 Calc. 388

ASSIGNEE, RIGHT OF, TO SUE : See ASSIGNMENT 345

ASSIGNMENT—*Claim for damages for breach of contract—Right of assignee to sue—Transfer of Property Act (IV of 1882), ss. 3, 6 (e), 130—"Actionable claim"—"Mere right to sue."* A claim for damages for breach of contract, after breach, is not an "actionable claim" within the meaning of section 3 of the Transfer of Property Act, but a "mere right to sue" within the meaning of section 6 (e) of the same Act, and therefore cannot be transferred. [*Per Maclean C. J. and Harington J., Fletcher J. dubitante*]

ABU MAHOMED v. S. C. CHUNDER (1909) I. L. R. 36 Calc. 46

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<p>CONTRACT—<i>Infraction—Breach of contract—Contract of personal service—Agreement—Absence of negative agreement—Negative covenant implied—Specific Relief Act (I of 1877), s. 57, also illustration (d)—Restraint of trade—Damages—Contract Act (IX of 1872), s. 74—Codified law.</i></p> <p>By an agreement made in England, M. was engaged by B. & Co. a firm of Engineers in Calcutta, as an assistant in their firm for a period of 5 years, and it was <i>inter alia</i> agreed that " he should diligently and to the best of his ability devote himself to the duties incumbent on him and should faithfully observe and comply with such instructions as he might from time to time receive from the firm." During the term of his engagement, M. left the employ of B. & Co. and entered that of another firm. On a suit, instituted by B. & Co., for an injunction to restrain M. from serving, working or being employed by any other person or persons and for damages. <i>Held</i>, although there was no negative condition in terms in the agreement, a negative covenant could be properly implied, under section 57 of the Specific Relief Act, and illustration (d) thereto, which gave legislative sanction in India to the law as laid down by Selborne L. J. in</p>	

Wolverhampton and Walsall Railway Company v. London and North-Western Railway Co., L. R. 18 Eq. 433, *Charlesworth v. MacDonald*, 1. L. R. 23 Bom. 103, *Lumley v. Wagner*, 5 Do G. and S. 485, *Whitwood Chemical Company v. Hardman*, [1891] 2 Ch. 419, *Ehrman v. Bartholomew* [1898] 1 Ch. 671, referred to. Where the law has been codified, it is of little avail to enquire what is the law apart from such codification: the Code itself must be looked to for the guide in the matter. As the contract had been most deliberately broken the plaintiffs were entitled to an injunction according to the principles of equity, justice, and good conscience.

BURN & Co. v. McDONALD (1908) 1 L. R. 36 Calc.	354
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CONTRACT ACT (IX OF 1872) s. 74: See CONTRACT	354

CRIMINAL PROCEDURE CODE (Act V of 1898), ss. 145, 192 (2) and 529(f)—*Dispute concerning land—Jurisdiction of Magistrate—Pendency of a civil suit for possession of the disputed land—Subsistence of prohibitory order on the date of the proceeding—Transfer of case without jurisdiction—Likelihood of a breach of the peace.* The pendency of a suit under section 9 of the Specific Relief Act (I of 1877) with regard to certain land in dispute does not oust the Magistrate's jurisdiction to take proceedings under section 145 of the Criminal Procedure Code in respect of the same land, if he finds reasonable grounds for apprehending a breach of the peace. The fact that on the date of the initiation of the proceedings under section 145 of the Code there was a subsisting order under section 144, the terms of which were not before the Court, passed against the landlords in a proceeding, to which the tenants, through whom they claimed to be in possession,

not vitiate the proceedings by reason of the provisions of section 529 (f) *Albar Ali Khan v. Dorn Lal*, 4 C W N. 821, followed. Section 145 requires that the Magistrate, before initiating proceedings thereunder, must be satisfied, on the materials before him, that there is fear of a breach of the peace with regard to some immoveable property between the parties. Where the Magistrate initiated proceedings under section 145 on a police report on which he was satisfied that there was an apprehension of a breach of the peace, and there was evidence on the record of a probability of such breach of the peace, the High Court refused to set aside the final order as without jurisdiction.

KISHORI LAL ROY v. SRINATH ROY (1909) 1 L. R. 36 Calc.	370
CRIMINAL PROCEDURE CODE (ACT V OF 1898) s. 421 See APPEAL, ADMISSION OF	395
CRIMINAL PROCEDURE CODE (ACT V OF 1898) s. 545 See DEATH BY RASH OR NEGLIGENT ACT	302
CRIMINAL RASHNESS OR NEGLIGENCE See DEATH BY RASH OR NEGLIGENT ACT	302
DAMAGES: See CONTRACT	354
DAMAGES FOR BREACH OF CONTRACT See ASSIGNMENT	345
DEATH BY RASH OR NEGLIGENT ACT— <i>Criminal rashness or negligence—Firing at object on the skyline of an eminence near a public road without proper precautions against danger—Indian Penal Code (Act</i>	

sequent deed with recitals confirming gift—*Suit by ancestor in title of donor against husband of donee for possession of subject of gift—Donee's power of alienation to prevent gift devolving on husband.* The question in this case was whether the appellant or the respondent was entitled by inheritance to a village the subject of a gift said to have been orally made by his predecessor in title of the respondent to his daughter on her marriage to the appellant in 1868, for possession of which the respondent sued. Her case was that the gift was subject to the condition that on the death of the donee without issue (which event had occurred) the village should revert to the donor and his heirs; and she relied on an *ekranama* executed by the donor in 1883, when the donee was separated from the appellant and was an inmate of her father's house, by which deed the alleged condition of the gift was recited and confirmed. The defence set up by the appellant was that the village had been given to him at the marriage for the benefit of himself and his wife, or, in the alternative, that, if it was given to his wife, he took it as her heir. The Subordinate Judge found on the evidence that the appellant and respondent both failed to prove any condition attached to the gift, but that, inasmuch as it was common ground that there was a gift to the daughter, it must be presumed to have been an absolute gift, and the appellant was entitled as her heir. *Held*, by the Judicial Committee, that the High Court was right in reversing that decision, because, if the gift of the village were absolute in favour of the daughter, she had, on the evidence in the case, by the subsequent deed of 1883, agreed it should at her death revert to her father and his heirs.

SHAM SHIVENDAR SARI v. JANKI KOER (1908) I. L. R. 36 Cal. . 311

TRANSFER OF CASE: *See* CRIMINAL PROCEDURE CODE (ACT V OF 1898), ss. 145, 192, 529 . 370

TRANSFER OF PROPERTY ACT (IV OF 1882), ss. 3, 6 (e), 130: *See* ASSIGNMENT . 345

UMPIRE, APPOINTMENT OF: *See* ARBITRATION . 388

[WAIVER—*Instalment bond—Default in payment of instalments—Limitation—Limitation Act (XV of 1877), s. 5, Sch. II, Art. 75—Cause of action—Disability or inability.* In an unregistered instalment bond there was a stipulation that in the event of default in payment of two consecutive instalments the creditor would be entitled to recover the whole amount covered by the bond, which was payable in twelve instalments. The second instalment was due on the 12th June 1899. The plaintiff brought a suit on the 1st June 1908 for recovery of the instalments due on the bond, relinquishing the first two instalments;—*Held*, that mere abstinence on the part of the plaintiff from bringing a suit for recovery of the whole amount due, on the failure of payment of the first two instalments, did not amount to waiver; and that limitation began to run from the 12th June 1899, when the cause of action arose. No subsequent disability or inability could arrest the running of limitation, under s. 9 of the Limitation Act. *Hurronauth Roy v. Maheroollak Mollak*, 7 W. R. 21, and *Mon Mohun Roy v. Doorga Churn Goode*, I. L. R. 15 Cal. 502, followed.

GIRINDRA MOHAN ROY v. KHEER NARAYAN DAS (1909) I. L. R. 38 Cal. . 324

APPELLATE CRIMINAL.

Before Mr. Justice Holmwood and Mr. Justice Ryves.

1908

December 2.

BAIJNATH DHANUK

v.

EMPEROR.*

Rioting—Right of private defence—Use of excessive violence by some members of the assembly—Responsibility of other members continuing in it, and aiding and abetting—Indian Penal Code (Act XLV of 1860), ss. 99, 147, 148, and 326.

If the accused are justified in resisting the theft of their crops, they cannot be considered as members of an unlawful assembly, with the common object to assert a right to the disputed land and crops, because some members thereof may have exceeded the right of private defence; but if some of the members continue in it, after the others have exceeded the right by the infliction of unnecessary violence, and aid and abet the latter, they also must be considered as having exceeded the right.

In the matter of Kalee Mundle (1) referred to.

Where the accused, three of whom were armed with a sword, a *garasa* (scythe) and a *lobanda* (iron-shod stick) respectively, and the rest with *lathis*, went in a large body to a certain disputed land, where the labourers of the opposite party were reaping some *musouri* crops, and attacked them, fatally wounding one and severely injuring another, it was held that the accused who ordered the attack, and those who used the sword, *garasa* and *lobanda* had exceeded the right of private defence, and so also the others, who continued in the unlawful assembly thereafter and aided and abetted the former.

CRIMINAL APPEAL.

THE appellants Baijnath Dhanuk and others were tried before the Sessions Court of Patna by a Jury on charges under sections 304, 326, and 148 of the Penal Code and, except Ram Sahai, also under section 113 of the same Code. The Jury unanimously found Ram Sahai guilty under sections 326 and 148, and the appellants under section 147 of the Code, and acquitted the others. The Sessions Judge agreeing with the Jury convicted Ram Sahai and sentenced him to five and three years' rigorous imprisonment, respectively, on the two charges

* Criminal Appeal No. 705 of 1908, against the order of H. W. C. Carduff, Sessions Judge of Patna, dated 30th July 1908.

(1) (1882) 10 C. L. R. 278.

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proved against him, the appellants Baijnath Dhanuk, Ghansyam Dhanuk and Ganouri Dhanuk to two years' rigorous imprisonment each under section 147, and the other appellants to one year's rigorous imprisonment under section 147 of the Code. All the appellants were further hound down in the sum of Rs. 300 to keep the peace for one year.

The prosecution story was that one Rafiuddin had lands in Bokaila Khanda, which ever since his purchase, 6 years ago, he cultivated as *khud khast*. The accused, who were residents of two neighbouring villages, or their predecessors, at one time held *ryoti jotes* in Bokaila Khanda, but it was alleged that at the time of partition, before Rafiuddin's purchase, they were ousted and their lands converted into *khud khast*, and that Rafiuddin had continued in peaceful possession. It was also the case for the prosecution that the crop of *musouri* growing on the disputed land at the time of the occurrence belonged to him. The accused claimed the land as their *ryoti* holding and asserted that the crop was theirs. On the 20th February 1908, Rafiuddin's *badwaris* and *barahils* proceeded to the land with 40 or 50 labourers armed with small sticks, and cut some *musouri* of one plot, and were cutting the crop of another plot, when a body of men, numbering 100 to 150, who had collected at the *dalan* of the appellant Ghansyam, within sight of the land, went there and declared their intention of removing the reaped crop. The *badwaris* remonstrated, whereupon the appellant, Baijnath, gave an order to beat them and to seize the crop. Ram Sahai, then attacked one Jhummun of the opposite party with a sword, inflicting a mortal wound. The accused Ghansyam attacked Rafiuddin's men with a *garasa* (scythe), Ganouri with a *lobanda* (iron-shed stick) and the rest with *lathis*. The malik Rafiuddin's servants and labourers did not show fight, but ran away leaving Jhummun and Sheocharan on the ground.

Mr. P. L. Roy (Babu Atulya Charan Bose with him) for the appellants. The Judge has misdirected the Jury. He should have told them that, if the accused were justified in resisting the theft of their crops, they could not be

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considered as members of an unlawful assembly, with the common object charged, viz., to assert a right to the land claimed by the malik, because some members of that assembly might have exceeded the right of private defence: see *In the matter of Kallee Mundle* (1).

The Deputy Legal Remembrancer (Mr. Orr) for the Crown contended that all the appellants had exceeded the right of private defence.

HOLMWOOD AND RYVES JJ. This is an appeal by Baijnath Dhanuk and six other persons against the convictions and sentences passed by the Sessions Judge of Patna, who, agreeing with the unanimous verdict of the jury, sentenced Baijnath Dhanuk, Ghansyam Dhanuk and Ganouri Dhanuk to two years' rigorous imprisonment, and Mudhu Dhanuk, Dular Dhanuk, Toja Dhanuk and Bijai Dhanuk to one year's rigorous imprisonment each, under section 147 of the Indian Penal Code. They were also bound down to keep the peace in Rs. 300 for one year.

It appears on the allegation of the maliks that they had, at the time of partition, six or seven years ago, ousted the Dhanuks, who admittedly were the cultivating tenants of the lands in dispute, and the maliks in exercise of their alleged right were cutting some unripe *musouri* with the aid of their servants, who do not seem to have been armed with anything more formidable than short sticks. The labourers, who were cutting *musouri*, must have had some kind of cutting instruments for the purpose of reaping the crop. The allegation was that 100 or 200 of the Dhanuks, consisting of the men of the village which claims the land, and some related Dhanuks belonging to another village, came armed, one Ram Sahai with a sword, one Ghansyam with a *garasa*, one Ganouri with a *lobanda* and the rest with *lathies*, and attacked the malik's men. On the order of Baijnath, Ram Sahai stabbed the deceased in the vitals with a sword, and he

fell on the ground. In his dying declaration the deceased named the seven men before us and Bulak and Dahi, the two men, who were not on their trial before the Court of Sessions. He named no others. The Jury convicted all these men under section 147. They also convicted Ram Sahai under section 326 of the Indian Penal Code. The appeal of Ram Sahai was rejected by a Division Bench of this Court on the ground that there could be no possible doubt that he at any rate exceeded the right of private defence. The present appeal appears to have been admitted on the ground, which is the only ground now taken by the learned Counsel for the defence, that the Judge ought to have told the Jury that, if the accused were justified in resisting the theft of their crops, they could not be considered as members of an unlawful assembly, on the common object charged, namely, to assert a right on the land claimed by the maliks, because some members of that assembly might have exceeded the right of private defence. Now this, if established, would be a very good ground indeed for this appeal. But it seems to us that in no less than two passages in his charge to the Jury, the learned Judge has drawn the attention of the Jury to this point, and on the second occasion he spoke most specifically. We, of course, do not know how much he may have enlarged upon it, but these are only the heads of charge. He commences by pointing out to the Jury that, if they are "not satisfied that the crop was Rassiuddin's, and find in favour of the accused, then the latter had undoubtedly the right of private defence against the landlord's emissaries, and were justified in interfering and removing the crop themselves. But the right is strictly a limited right, and, if it is exceeded, the benefit of it as a plea is lost." He goes on to say "the *onus* is on the accused to show not only that he was exercising the right, but that he did not exceed it, and the *onus* may be discharged without adducing independent evidence." He, therefore, evidently considered that each man had to establish his case for himself. Later on, after explaining the duties of the Jury and the law on the subject, he says to the Jury "having found the actual facts for yourselves you must proceed in the

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light of those remarks to decide whether the accused exceeded the right in this case. If you find that the right was exceeded, then you should go on to consider the evidence of participation against each one of the accused individually." He then proceeds to summarise the evidence against each of them. The consideration of participation against each, which the learned Judge enjoins upon the Jury, is obviously the consideration upon which they had to decide, if the accused had exceeded the right of private defence, or rather, if the right of private defence had been exceeded by all or any of them. There is, therefore, clear indication in this passage that the Judge did warn the Jury not to place all the accused in the same category in respect of this right. But at the end of his charge he gave them a still more decided warning. In dealing with the case of Ram Sahai he says "you should also consider the question of the right of private defence with reference to the special and separate charge against Ram Sahai. Is he personally protected by that right as explained above? You may find that the rioters generally did not exceed their right, but it does not follow that Ram Sahai did not exceed his, if he acted in the manner alleged against a person armed apparently with at most a small stick." It is perfectly clear from this passage that the Judge drew the necessary distinction between persons, who had used weapons and used them in excess of the right of private defence, and persons about whom it was open to the Jury to find that they had not exceeded that right. It does not, therefore, appear to us that there was a misdirection. But we think it is perfectly clear that the Jury were moved to convict the persons they did by the fact that these were the only men, who were mentioned in the dying declaration of the deceased, and in connection with a ruling of this Court, which has been cited to us by the learned Counsel for the appellant, this view of the Jury becomes somewhat important. In *In the matter of Kalee Mundle* (1), a Division Bench of this Court observed: "when individual members of that assembly exceeded their right of private defence, did it become

an unlawful assembly within the definition in section 141 of the Indian Penal Code? Such a conclusion could be supported, if the Judge had found under section 142 of the Indian Penal Code, that all or some of the ryots, having become aware that the right of private defence had been exceeded by some members of the assembly, continued in it." In that case there was no indication that they did. In this case the Jury evidently were moved by the most patent consideration that these were the men, whom the deceased had seen and identified, when he was lying on the ground mortally wounded, under the order of the first accused, by Ram Sahai. He actually saw these men standing so near to him that he could identify them. This would lead to an inference by the Jury that there was an unlawful assembly, and that these men continued in the assembly, and aided and abetted the persons, who exceeded the right of private defence. As a matter of law we are inclined to hold that Baijnath, who gave the orders upon which Ram Sahai used a sword, would not be protected by any right of private defence, and it must be held that he exceeded that right. There is also another of the appellants, Ganouri Dhanuk, against whom there was evidence before the Jury that he used a *lobanda* (iron-shed *lathi*) upon the hand of one of the persons present. For these reasons we think that there was no misdirection, and that, even if the Jury thought that the remainder of the accused had the right of private defence, they were fully justified in finding that these seven men had not that right, or continued in the unlawful assembly after they knew that the right of private defence had been exceeded. We may mention that the number of persons acquitted by the Jury, possibly on the ground that they were acting in the exercise of the right of private defence, was 28 out of 36 charged before them. It is, therefore, clear that the Jury must have had special grounds for bringing in the verdict they did against these seven persons, and we cannot assign any other ground than that we have just now indicated.

The appeal will be dismissed, and the accused will serve out the rest of their sentences.

Appeal dismissed.

CRIMINAL REFERENCE.

Before Mr. Justice Holmwood and Mr. Justice Ryves.

1909

January 13.

EMPEROR

v.

MORGAN.*

Death by rash or negligent act—Criminal rashness or negligence—Firing at object on the sky-line of an eminence near a public road without proper precautions against danger—Indian Penal Code (Act XLV of 1860), ss. 304A, 336, 337 and 338—Compensation to relative for death by rash or negligent act—Criminal Procedure Code (Act V of 1898), s. 545.

Two persons, one a corporal and the other a private, who had both been in the regiment over four years, went to a plantation at the edge of which there was an eminence on which they set up at the sky-line a small tin case as a target, and fired several shots at it, from a distance of 100 feet, with a quarter inch bore saloon rifle sighted to 100 yards. There was a public road used by the villagers about 150 yards away, and 60 feet below the level of the eminence, but in the direct line of fire.

The road was not visible from the firing point, but clearly so from the target. A bullet struck a man passing along the road at a spot in the line of fire, though it did not appear, who had fired the shot. No precautions of any kind were taken to prevent danger to passers-by on the road from such firing.

Held, that they were both guilty of criminal rashness and negligence within section 304A read by itself without reference to ss. 34 and 107, in firing at an object on the sky-line of the eminence, against the light, (which was in itself dangerous), near a public road within the zone of fire with a rifle which, sighted to a 100 yards, they must have known might easily carry some considerable distance beyond and prove fatal, without taking any precautions or using the slightest circumspection with reference to the safety of others.

The words "rash or negligent act" in section 304A of the Penal Code have the same meaning as "does any act so rashly or negligently" in sections 336, 337 and 338. Section 336 renders criminal the doing of any act so rashly or negligently as to endanger human life or the safety of others, irrespective of the consequences. Sections 337 and 338 only impose a greater punishment when hurt or grievous hurt is the result of such rashness or negligence. Section 304A provides for the case of death by such rash or negligent act under circumstances not amounting to culpable homicide.

* Criminal Reference No. 40 of 1908, by F. S. Hamilton, Sessions Judge of Darjeeling, dated the 16th November 1908.

Reg. v. Salmon (1) and *Reg. v. Nidamarti Nagabhushanam* (2).

Section 545 (1) (b) provides for compensation, in cases where it is recoverable under Act XIII of 1855, to the persons therein indicated, viz., "the wife, husband, parent and child, if any" of the deceased.

Yalla Ganqulu v. Mamili Dali (3) dissented from.

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CRIMINAL REFERENCE.

THE accused, Corporal Morgan and Private Lawson of the Highland Light Infantry, were tried under sections 304^A of the Penal Code before the Sessions Judge of Darjeeling with a Jury, who found that they, or one of them, caused the death of the deceased, that they were careless but not criminally so, and that they were, therefore, not negligent within the meaning of the section. The Sessions Judge refused to accept the verdict, and referred the case to the High Court under section 307 of the Criminal Procedure Code.

On the morning of the 25th October last the accused went out for shooting practice with a quarter-inch bore saloon rifle sighted to 100 yards. They went down the Old Calcutta Road and up the hill-side to a plantation, where they found a tin case about six inches by four, which they set up as a target at a spot (marked *c* on the plan) on the sky-line on a small eminence at the edge of the plantation, and fired several shots at it from a point (marked *b*), a distance of 100 feet, and against the light. The Old Calcutta Road, a bend of which comes directly in the line of fire from *b* to *c*, was not visible from the firing point, but clearly so from *c*, to which the accused admittedly went in order to fix up the tin case. The distance of the road from this place is about 150 yards beyond, and lower by about 60 feet than the level of the eminence. The road was not usually much frequented, but it was a public way used daily by the villagers of Aleehari. A bullet struck the deceased, who was passing along the road, at a point *d*, which was in the direct firing line between *b* and *c*. It was not found, who fired the fatal shot, but the bullet extracted from the body of the deceased fitted the cartridges used by the two accused.

(1) [1860] L. R. 6 Q. B. D. 79.

(2) (1872) 7 Mad. H. C. 119, 120.

(3) (1897) L. L. R. 21 Mad. 74.

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Mr. Stokes (with him *Babu Lalit Mohan Banerjee*) for the accused. The verdict of the Jury is plain. They found that the accused were negligent, but not criminally so. They are entitled to find the degree of negligence there was in the case as a question of fact. The verdict is not perverse, and should not be interfered with.

The Deputy Legal Remembrancer (*Mr. Orr*) for the Crown. The evidence shows that the accused were guilty of negligence within the meaning of section 304A, and, even if not, the offence under section 336 has been made out.

HOLMWOOD AND RYVES JJ. Corporal Morgan and Private Lawson of the Highland Light Infantry were placed on their trial before the Sessions Judge of Darjeeling and a Jury on the 16th of November 1908. The charge against them, as amended in the Court of Session, was framed under section 304A read with section 114 of the Indian Penal Code, and ran as follows :—"That you, on or about the 25th day of October 1908, at Aloobari Busti, each abetted the other in the causing of death by a rash or negligent act, each being present when the act, which resulted in death, was committed, and the act abetted being committed in consequence of the abetment, and thereby committed an offence punishable under sections 304A of the Indian Penal Code." We will refer later on to the wording of this charge. The accused pleaded not guilty to the charge and, at the conclusion of the trial, the Jury returned the following verdict : "We find that the accused, or one of them, caused the deceased's death. We find that they were careless, but not criminally so, and that, therefore, they were not negligent within the meaning of the section. We, therefore, find them not guilty of the offence charged." The learned Sessions Judge, however, refused to accept this verdict, and has referred the case to us under the provisions of section 307 of the Code of Criminal Procedure.

The facts of the case are very simple and are admitted. Indeed, almost the entire evidence, which connects the accused

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with the death of the unfortunate man Kaachar Singh, is to be found in the frank statements which the accused made before the committing Magistrate and to which they have all along adhered. It appears from these statements, which we accept, that on the morning in question the two accused, who belong to a regiment that has been stationed for some time at Jalapahar, went out to practise target shooting. They took with them a "small rifle." This rifle is not before us, but it was before the learned Sessions Judge and the Jury, and has been described as having a small bore, one-fourth inch in diameter, and was sighted for 100 yards. They proceeded down what is known as the Old Calcutta Road and along it to the Bhutia graves, and then climbed up the side of the hill to the cryptomeria plantation. Here they found a small empty tin which they used as a mark. They first stood at a point marked *f* on the plan, and fired a few shots at the tin, which was placed at a point marked *c*. They then went from *f* to a point marked *b*, and placed the tin at a point marked *a*. So far their shooting was perfectly safe. Next, they placed the tin again at *c* on a small eminence on the sky-line, and fired at it from *b*, a distance of 100 feet, against the light. It appears from the evidence that a person standing at *b* and firing at *c*, which was on the sky-line, could not see the Old Calcutta Road, a bend of which comes directly into the line of fire from *b* to *c*, some 640 feet, according to the map, beyond the point *c*, but some 60 feet lower. This measurement, however, is entirely fallacious, as it was made by passing a tape over the very uneven surface of the intervening ground. The actual distance that the bullet would have to travel between the points *c* and *d* does not seem to be more than about 150 yards. For the first 120 yards or so, probably its flight was fairly horizontal; after that the bullet, which had lost much of its velocity would probably have dropped very quickly. It is proved, however, that a person, standing at *c* could plainly see the road. In their statements the accused say they both went to the point *c* to place the tin. They must, therefore, if they had used the least circumspection, have noticed this road. It is true that the road is not one that

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human life or the safety of others. The mere doing of an act so "rashly or negligently," quite irrespective of the consequences, was made an offence. Now, on the facts of this case, adopting the definition of "criminal negligence" given above, we are clearly of opinion that both the present accused could have been convicted under section 326 because they fired with the rifle from the spot *b*, at a mark which they had placed on the sky-line at *c*, without having taken any precaution or used the slightest circumspection with regard to the safety of others. Section 327 only enables a Court to impose greater punishment when hurt is the result of such criminal rashness or negligence. Similarly section 328 provides for a still further enhanced punishment when, under similar circumstances, grievous hurt is the result. The original Code made no provision for the case of death being caused by such a rash or negligent act. We think section 301A does nothing more than supply the omission by rendering a person or persons, who caused the death of another by a rash or negligent act, under circumstances not amounting to culpable homicide, liable to punishment up to two years' imprisonment, or with a fine or with both. We think, therefore, that both the accused can legally be convicted and punished under section 301A of the Indian Penal Code because the death of Kachar Singh was directly due to what we hold to be a criminally negligent act on the part of both of the accused within the meaning of section 301A. We, therefore, think that the law in India is in accord with what was laid down in *Reg. v. Salmon* (1), and that it is unnecessary to call in aid sections 34 or 107, even assuming that either of these sections could possibly apply when the facts showed that at the most the accused were guilty of "negligence" only. It is difficult to see how a person can "abot" the "negligence" of another without himself being equally "negligent" within the meaning of the section, having regard to the definition of "negligence" above quoted. It seems to us that these two soldiers, one of whom is a Corporal, and both of whom have been in the army for over four years and, therefore, must be familiar with the

use of fire-arms, were bound to use all reasonable precautions to prevent their firing from endangering human life. Although the rifle they were using was not a very dangerous weapon, they must have known that, as it was sighted up to 100 yards at least, it might easily prove fatal for some considerable distance beyond that limit, and the fact that they fired at an object on the sky-line on the hill side and against the light was, as they probably would have themselves admitted, if they had stopped to think for a moment, in itself dangerous. Further when they stood at the point *c* to fix their mark, they should have looked round and satisfied themselves that there was no danger in firing in the direction from *b* to *c*. If they had used the least circumspection, they would have seen that the head of the public road was in the direct line of fire, a little below them and not more than about 150 yards distant.

For the above reasons we convict both the accused under section 304A of the Indian Penal Code.

We do not, however, think that a severe sentence is called for in this case. We think the ends of justice would be met by imposing a fine. We direct that they be fined Rupees fifty each or, in default, suffer rigorous imprisonment for a period of three weeks. We further direct that the fines, if paid, be handed over to the widow of the deceased or such other person, whom the District Magistrate on enquiry may find entitled to it, under the provisions of section 545 of the Criminal Procedure Code.

We are aware that a Full Bench of the Madras High Court, in the case of *Yalla Gangulu v. Mamidi Dali* (1) has held that compensation cannot be given to the widow of a deceased person in a case like this. But, apart from the rulings of the Madras High Court, we know of no ruling which has taken the same view of section 545 as it stands in the present Code, and we prefer to follow the opinion of Benson J. to the contrary in his order of reference to the Full Bench for the reasons which he has given. There are two cases of this Court which interpreted the law in the same way as the Full Bench of the Madras

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The principal question for decision in this appeal was the nature of the interest granted by the late Maharaja Rajendra Kishore Singh of Betia to his daughter Ratnahati Koer in the village of Samahuta.

The Botia Raj was an impartible estate. In 1867 the owner was Maharaja Rajendra Kishore Singh. On 28th July of that year, he executed a deed by which he appointed a committee for the management of his estates and undertook, among other things, not to alienate any portion of them. He died on 28th December 1883 and was succeeded by his son Maharaja Sir Harendra Kishore Singh, who died on 26th March 1893 and was succeeded by his senior widow Maharani Sheo Ratan Koer, on whose death on 24th March 1896 Maharani Janki Koer, the respondent, as junior widow became entitled to the estate.

On 15th June 1883, Maharaja Rajendra Kishore Singh executed the following document in favour of his daughter Babui Ratnahati Koer:—

"Mouzah Samahuta, Pergunnah Bal, District Sarun, was without the execution of any deed conveyed by gift in khoincha to my daughter Babui Ratnahati Koer on the occasion of her marriage, and no deed has up to this day been executed in respect thereof in favor of the said Babui Saheba. I have been paying the Government Revenue and road cess, etc., and my name still stands recorded in the Collectorate. It is now necessary that a deed in respect thereof should be executed in favor of the said Babui Saheba and her name registered in the Collectorate. Therefore I convey by gift in khoincha hereunder the said mouzah, i.e., mouzah Samahuta, Pergunnah Bal, the value of which is Rs. 100,000 to Babui Ratnahati Koer (may she live long) with the same conditions as before. It is provided that the said Babui Saheba shall, without having the power of making transfer, hold possession of the said mouzah and enjoy the proceeds thereof during her lifetime. After the death of the said Babui Saheba any child born of the womb of Babui Saheba will hold possession of the same. In the event of her dying without any child born of her womb, the said mouzah will again revert to me and after me it will pass to my heirs as proprietors thereof. The said Babui Saheba shall get her name registered in the Collectorate on expunction of my name and pay the Government Revenue and public demands; I neither have nor shall have any objection to it."

The oral gift therein referred to was made in January 1868 on the occasion of the marriage of Ratnahati Koer to Sham Shivendar Sahi, the present appellant, and it appeared from

the recitals in the above deed that subsequent to the gift the name of the donee was not entered in the Collector's registers, whilst the Government revenue and village cesses were paid in respect of Samahuta by the Maharaja: though from the time of the marriage until his death in 1880, Sridhar Sahi, the father of the appellant, seems to have received the rents and profits of Samahuta on behalf of his son.

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On the succession of Maharaja Sir Harendra Kishore Singh in December 1883 to the Raj, in pursuance of a step which had been contemplated in his father's life-time, an application was made on 13th February 1884 that the name of the donee Ratnabati Koer should be recorded in the Collector's registers, and orders for the entry therein of the lady's name were made on 21st June 1884. The claim for such registration was expressly based on the deed of 15th June 1883.

On 20th August 1890, the appellant's name was entered in the register as manager on behalf of his wife in regard to one half the village of Samahuta, and on 31st March 1896 in regard to the other half.

Ratnabati Koer, who since 1875 had separated from her husband and had lived with her father, died on 6th August 1896 without leaving issue; and on 29th October 1896, application was made to have the name of Maharani Janki Koer, who had then succeeded to the Raj, entered on the Collector's register in place of that of Ratnabati Koer, on the ground that under the conditions on which the village of Samahuta was held it reverted to the Betia Raj on the death of Ratnabati Koer without issue.

An application for the registration of his own name was made on 4th February 1897 by the appellant, who based his claim on his possession.

Both these applications were disposed of on 17th October 1898 by an order of the Deputy Collector, who directed the entry of the appellant's name on the register, in consequence of which Maharani Janki Koer on 13th February 1900 instituted the suit out of which the present appeal arose.

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The plaint recited the gift by Maharaja Rajendra Kishore Singh to Ratnabati and the conditions on which it was made, stated that in accordance with those conditions the village of Samahuta reverted to the Betia Raj, and prayed for possession thereof with mesno profits.

The defendant in his written statement asserted that at the time of his marriage the village of Samahuta was gifted to him personally for the benefit of himself and his wife and not to his wife; and, in the alternative, that if the gift was made to his wife it was made free of the limitations and conditions sought to be attached to it, and conveyed to her an absolute estate in the village, which on her death vested in him as her heir.

The Subordinate Judge was not satisfied with the oral evidence adduced on behalf of the plaintiff, remarking that it was incredible and repugnant to Hindu feeling that on the auspicious occasion of the marriage of Ratnabati the gift should have been made expressly defeasible on her death without issue, and he held that the ceremony at which, according to the plaintiff's case, the gift was made "only takes place when the bride for the first time goes to her husband's house, on which occasion farewell gifts are made in khoicha (extremity of the cloth worn by the girl) which is untied in the girl's husband's house:" and remarked that Ratnabati having been married in childhood went to her husband's house for the first time four years after her marriage, while "according to the case of either party the defendant's father, and after his death the defendant, have been in possession of Samahuta and enjoyed the profits since the date of the gift in 1868." With regard to the *ekrarnama*, dated 15th June 1883 on which the plaintiff relied, the Subordinate Judge, after observing that Ratnabati had no independent share in the marriage, expressed his opinion that "the gift must have in her to execute the deed with the village family, there being at that time no division of the estate between the defendant and the plaintiff." The Subordinate Judge, after observing that Ratnabati had no independent share in the marriage, expressed his opinion that "the gift must have in her to execute the deed with the village family, there being at that time no division of the estate between the defendant and the plaintiff."

the documents relating to the various proceedings under the Land Registration Act (Bengal Act VII of 1876) and the Land Acquisition Act (X of 1870) and so far as the plaintiff's case was concerned he concluded as follows :—

" From the observations made above upon the oral and documentary proof of the plaintiff, I find she has failed to prove affirmatively her case as alleged in the plaint, viz., that mahal Samahuta was given to Bahui Ratnabati in *dan khotincha* for her life and that after her death it would devolve upon her issue and that on her dying childless it would revert to the Beta Raj."

As to the defendant's case the Subordinate Judge held that on the oral evidence "his title to Samahuta in *dahez* was not established." After considering the documentary evidence he expressed the opinion that it did not improve his case, and as to the cases of both parties he concluded his judgment as follows :—

" The result of the consideration of the evidence in this case is that the plaintiff has failed to establish the case as alleged by her and that the defendant has also not been able to make out the case of absolute gift of Samahuta in *dahez* to him. It is admitted on behalf of the plaintiff that village Samahuta was given under a verbal gift to the defendant's wife, Bahui Ratnabati Koer, on the occasion of her marriage. She alleges, however, that the gift was a qualified one, being defeasible on Bahui dying childless. This limitation or condition is not proved. Hence under the law the gift must be considered to have been made absolutely to the Bahui, and on her death the defendant as her husband and heir is entitled to succeed to village Samahuta in which his possession has been undisturbed all through and as such it must be maintained. The plaintiff's suit must accordingly be dismissed."

On appeal by the plaintiff the High Court (Henderson and Geidt JJ.), whilst expressing their opinion that little reliance could be placed on the oral evidence on either side with regard to the terms on which the gift was made, held with reference to the *ekrarnama* of 15th June 1883, and the proceedings under the Land Acquisition Act, and Bengal Act VII of 1876, and having regard to the circumstances under which the gift was made and to the conduct of the parties subsequent to the gift, that the plaintiff had established that the gift was made subject to the condition alleged in the plaint. The High Court therefore reversed the decision of the Subordinate Judge and made a decree giving the plaintiff possession of Samahuta with mesne profits.

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ON THIS APPEAL.

Sir R. Finlay, K.C., and *Kenicorthy Brown*, for the appellant, contended on the evidence that the High Court was wrong in holding that the respondent had proved that the gift was made subject to the condition alleged by the respondent. For the reasons given by the Subordinate Judge it was submitted that the High Court ought to have found that the appellant was entitled to the village sued for either in his own right or as heir to Ratnabati Koer. The village, the subject of the gift, was of considerable value, and it was very improbable that the condition, if made, would not have been put on record in writing, and not left, in the case of an estate of such value, to be settled orally. The burden of proof in the matter was on the respondent and she had not discharged it. Reference was made to the Land Registration Act (Bengal Act VII of 1876), section 3, clause 6.

DeGruyther, K.C., and *E. U. Eddis*, for the respondent, contended that there were concurrent findings of fact that at the time of his marriage the village in suit was not gifted to the appellant. As held by the High Court the respondent had sufficiently established that the village was given to Ratnabati Koer subject to the condition that, if she died without issue, it should revert to the Botia Raj. As to the probability that the *ekrarnama* of 15th June 1883 stated the true facts of the matter as to the gift, reference was made, among others, to the following passage from the judgment of the High Court. "It must not be lost sight of that at this time the defendant and his wife were on very bad terms, that they had ceased to live as husband and wife, and that there was no longer a possibility of issue of this marriage. On the one hand, this fact might be a very good reason for a deed being executed in order to put on record the actual terms of the gift. On the other hand, as suggested by the defendant, it might be an equally strong reason for the Maharaja endeavouring to prevent the village on the death of his daughter passing into the hands of the defendant and so being absolutely lost to the Raj. But the evidence is that the Maharaja was up to his death on good terms with his son-in-law.

At the same time it must be taken that the Maharaja was aware of the terms of the original gift and he admittedly enjoyed the reputation of being a thoroughly upright and honest man." The reason for the *ekrarnama* being executed was in order to conform to the provisions of the Transfer of Property Act (IV of 1882) as to registration. The right of the parties to the village was now, it was submitted, governed by the terms of that deed, by which provision for reversion to the Raj in default of issue, is expressly made. Reference was made to Mayne's Hindu Law, 7th edition, pages 885, 886 as to the power of a wife to dispose of property without consent of her husband. The conclusion came to by the Subordinate Judge in favour of the defendant was one, which there was no evidence on the record to support.

Sir R. Finlay, K.C., in reply.

The judgment of their Lordships was delivered by—

LORD MACNAUGHTEN. This is an appeal from the High Court at Calcutta reversing the decree of the Subordinate Judge of Sarun.

The matter in controversy is the possession of mouza Samahuta. This mouza formed part of an impartible raj known as Betia Raj. In 1868 the owner of the Betia Raj was the Maharaja Rajendra Kishore Singh. In that year his daughter Ratnahati Koer was married to the appellant, Sham Shivendar Sahi. On the occasion of the marriage the Maharaja made a verbal gift of Samahuta. The question is : To whom and on what conditions, if any, was the gift made ?

In the Court of first instance the respondent, Maharani Janki Koer, who had succeeded to the raj, maintained, as she still maintains, that the mouza was given to Ratnahati subject to a condition that, if she should happen to die without issue—as she did—it should revert to the raj. She was plaintiff in the suit. The appellant, who was defendant, asserted that Samahuta was given to him, for the benefit, of course, of his wife and himself. He also set up, argumentatively, an alternative

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case. In his written statement he suggested that, if it should be held that the gift was a gift to his wife—which, he averred, was not true in fact—then it ought to be held that, on the death of his wife without issue, he became the owner as her heir.

The marriage of Ratnahati took place in January 1868. The bride was then seven or eight years old, the bridegroom nine or ten. In April or May 1872 Ratnahati went to her husband's house. She stayed there only a short time, returning to her father in June or July 1872. In November 1873 or 1874 she went back to her husband, but left in November or December 1874 or 1875, declaring that she would rather die than live with him any longer. The rest of her life was spent at Betia, where she resided with the Maharaja.

From the time of the marriage until his death in 1880, Sri-dhar Sahi, the defendant's father, received the rents and profits of Samahuta on behalf of his son.

In 1877, after the Registration Act VII of 1876 came into force, the Maharaja applied that his name, which had remained on the Collectorate books, might be registered in respect of Samahuta. The necessary notifications were issued, and, after some opposition at first on the part of the defendant, the name of the Maharaja was registered, and registered ultimately without objection in July 1879.

On the 15th of June 1883, the Maharaja executed an *ekrar-nama*, which is the most important document in the case. After reciting that Samahuta had been given to his daughter by way of *khoitcha* gift at the time of her marriage, but that no deed had been drawn up, the Maharaja purported to convey Samahuta to Ratnahati by way of *khoitcha* gift "with the same conditions as before," to hold possession and enjoy the income, but without power of alienation, subject, however, to the provision that, in the event of her dying without issue, the property should revert to him and after him to his heirs. It was also provided that Ratnahati should get her name registered in the Collectorate and pay the Government revenue and all public demands.

On this deed being executed, Ratnabati took steps to get her name registered, relying on the deed of the 15th of June 1883 for her title. No objection was raised on behalf of the defendant.

The Maharaja Rajendra Kishore Singh died on the 28th of December 1883, and was succeeded by his son, Sir Harendra Kishore Singh.

Ratnabati's name was duly registered on the 21st of June 1884.

Shortly afterwards the defendant brought a suit against Harendra to recover his wife, but the suit was dismissed.

Between 1884 and 1891 several pieces of land in Samahuta were acquired for the Bengal North-Western Railway. The purchase money, or compensation, was received by the Maharaja, although there seems to have been a claim at first on the part of the defendant.

In 1887 the defendant brought rent suits against tenants of lands in Samahuta, alleging that he was in possession and making collections in his own name. The suits were dismissed on the ground that he was not the registered proprietor, the lands being registered in Ratnabati's name. Then he applied to be registered as manager for his wife. In this application the deed of the 15th of June 1883 was again referred to, and recognized as a document of title.

The Maharaja Harendra died on the 26th of March 1893, leaving two widows, but no issue. On the death of the elder widow the present respondent succeeded to the raj as her husband's heir. Then she claimed to be registered in the place of Harendra. But after a contest before the Deputy Collector, the defendant succeeded in getting mutation of names in his favour.

The ground of claim, which he asserted, was not inheritance from his wife, but "proprietary right, having possession."

The respondent then brought this suit.

The Subordinate Judge gave judgment on the 14th of April 1902. He observed at the outset of his judgment that it would be a difficult task to arrive at a right conclusion in this case.

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He put aside, as unworthy of credit, the oral evidence adduced on the one side and on the other, to prove what was said and done on the occasion of the marriage. He rejected the case put forward on behalf of the defendant, which was that Samahuta was given to him. He thought the defendant himself unworthy of credit. But he also rejected the case of the plaintiff, mainly on the ground that it was impossible to believe that on so auspicious an occasion as marriage the contingency of the death of the bride without issue could have been referred to. "The story of the gift," he says, "is altogether repugnant to a Hindu feeling. It can find no credence with me." And then he held that, as the plaintiff failed in her case and the defendant failed in his, it followed, inasmuch as it was common ground that there was a gift, that it must be taken that the gift was absolute in favour of Ratnabati. And so it was adjudged that the defendant should succeed as heir to his wife.

The learned Judges of the High Court on appeal reversed the judgment of the Subordinate Judge. They agreed with him in thinking that no reliance could be placed on the oral evidence. But they thought that there was no ground for impeaching the *ekarnama* of the 15th of June 1883, and, after a careful and elaborate review of all the facts and circumstances of the case, they came to the conclusion that the acts and conduct of the defendant were inconsistent with the case which he set up as being the true case, and equally inconsistent with the case on which he was content to rely, although he protested it was not true.

The learned Judges rejected with something like scorn the excuses which the defendant made for his conduct and his affectation of ignorance in regard to what was being done from time to time in his name and on his behalf. This part of his case depended entirely on his own testimony. His character for truth fared no better in the Court of Appeal than in the Court below. The learned Judges describe him as "a man who is utterly reckless as to what he will say, if he thinks it will advance his case."

On the appeal to this Board the learned Counsel for the appellant attacked the judgment of the High Court on the ground that the learned Judges had not addressed themselves to what was then the real issue. They had, it was said, combated with great elaboration a case which had been disposed of in the Court below. They slew the slain over again. But they gave the go-by, or at least paid scant attention, to the grounds on which the Subordinate Judge had decided in favour of the defendant.

Their Lordships think that this criticism is not well founded. If the judgment of the High Court is read carefully, it is quite plain that the defendant must have relied, and relied entirely, on the case which he set up in his written statement. That was, as the learned Judges say, his "real case," although an alternative case was suggested. This is clear from the judgment, which does not even notice the main, if not the only, ground of the judgment of the Subordinate Judge. But it is made still plainer by the course which the defendant adopted. He was not altogether satisfied with the judgment he had obtained in his favour. He filed a memorandum of cross-objection to the plaintiff's petition of appeal. He preferred his petition, he said, "being dissatisfied with a portion of the decision of the Subordinate Judge." The main ground of his cross-objection was that the Court below was—

'wrong in rejecting the case set up by the petitioner and disbelieving the evidence adduced by him in support thereof. The said Court should have held upon the evidence on the record that Samahuta was given to him absolutely for the benefit of himself and his wife at the time of the departure of the barat as alleged by him.'

Probably the defendant was well advised in taking this course. There is not a shred of evidence in support of the view which determined the Subordinate Judge in favour of the defendant. With all respect to the learned Judge, whether he was right or wrong in his view, it would have been out of the question to ask the Court of Appeal to rely on a statement unsupported by evidence at a time when there was no opportunity for contradiction or cross-examination. It certainly would seem that the defendant himself did not place much

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"wrong in rejecting the case set up by the petitioner and disbelieving the evidence adduced by him in support thereof. The said Court should have held upon the evidence on the record that Samahuta was given to him absolutely for the benefit of himself and his wife at the time of the departure of the barat as alleged by him."

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Held also that the plaintiff had no means of discovering the truth, while the sale was going on, and he was perfectly justified in relying on the statement, as to the property, which was being sold, made by the auctioneer. The exception in section 19 of the Contract Act had no application to the case.

Held further that the Chief Clerk was right in referring the matter to the Court, and in not proceeding under section 303 of the Civil Procedure Code.

APPEAL from a judgment and decree (February 13th, 1907) of the Chief Court of Lower Burma on its Appellate Side, which affirmed a judgment and decree (June 12th, 1906) of the Judge of the same Court on its Original Side.

The plaintiff was the appellant to His Majesty in Council.

Mahomed Kala Mea, the plaintiff, was the highest bidder at an auction-sale of certain property in Rangoon, which took place on 2nd May 1905 under a decree of the Chief Court of Lower Burma obtained by the first respondents, the members of the firm of Harperink Smith and Company against one Kani Choay, the second respondent; and the suit was brought on the 16th May 1905 to set aside the sale, on the ground that the plaintiff had purchased the property under a *bona fide* misapprehension of fact.

The plaintiff in his plaint, after stating that the property was subject to charges amounting to Rs. 64,500 with interest, and that at the auction-sale he bid for it and it was knocked down to him for Rs. 38,000, alleged in paragraph 4 that "before the bidding commenced one Hadji Shah Mahomed Ali said that he did not understand the proclamation, which had been read in English, and asked the bailiff what was being sold. The deputy bailiff Mr. Innes thereupon said in Hindustani 'Char mortgage hai; is waste Court ka hukum so bikri hota. Title deeds Registrarka office men dekne sakta.' " He also alleged that he bid for the property under the *bona fide* belief that it was being sold free of the mortgages upon it; that as it was not worth in any case more than Rs. 40,000 he would not have bid anything if he had known that it remained liable to the mortgages; and that under all the circumstances he was desirous of having the sale set aside on the ground of his *bona fide* mistake, a course to which Harperink Smith and Company consented

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and he had added them merely as *pro forma* defendants. The plaintiff prayed that the sale might be set aside ; that all proceedings for the recovery of the amount bid by him might be stayed ; and that Kani Choay, the second defendant, might be ordered to pay the costs of the suit.

The first defendants put in no written statement in answer to the suit. In his written statement the second defendant admitted that the property the subject of the sale belonged to him, but had been attached by the first defendants ; that it was subject to the charges stated in the plaint ; and that it had been knocked down to the plaintiff for Rs. 38,000. But he put the plaintiff to strict proof of the allegations contained in paragraph 4 of the plaint, and also as to the statement that the plaintiff bid for the property under a *bona fide* mistake. He alleged that the property was worth much more than Rs. 40,000, and submitted that the allegations and circumstances relied on in the plaint afforded no ground for setting aside the sale.

The only issue was "are the allegations in paragraph 4 of the plaint correct ; and if so, do they afford any grounds for setting aside the sale ?"

The plaintiff's evidence was to the effect that he was driving past the place, where the property was to be sold, when a Court messenger told him that a sale was about to take place ; he accordingly alighted and attended the sale without having seen the proclamation or being cognisant of its terms. Mr. Innes, the deputy bailiff of the Court, acted as auctioneer and at the opening of the proceedings read the proclamation in English, a language unknown to the plaintiff. Upon this being read, Hadji Shah Mahomed Ali said he did not understand it and would like to know the meaning of its contents, whereupon Mr. Innes made a statement in Hindustani as above-mentioned, which the Court interpreter translated : "There are four mortgages : therefore the sale takes place by order of the Court. The title deeds can be seen at the Registrar's Office." From this statement the plaintiff said he understood that the property was mortgaged, but that it

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was being sold free of the mortgages, as they would be paid from the purchase-money, and in this belief he made a final bid of Rs. 38,000 at which price the property was knocked down to him. Immediately after the sale he learned that the property had been offered subject to four mortgages upon it. Thereupon he refused to pay a deposit or any part of the purchase money, and took proceedings to get the sale set aside.

The plaintiff's evidence was corroborated by Mr. Weslia (one of the four mortgagees) as to the reading of the proclamation and the words in Hindustani spoken by Mr. Innes. He stated that he understood the words to mean that the property was mortgaged and had to be realized under the order of the Court, and he further understood that the proceeds of the sale would go to pay the mortgages upon the property. Two other witnesses, Ebrahim Bymeah and Issac Sofaer, gave the same account of what occurred and said that the Hindustani words conveyed the same impression to their minds. The latter said that he had bought and sold a good deal of land and owned property near to that which was the subject of the sale: that he valued the land sold at Rs. 40,000 or Rs. 45,000 at most and that he bid up to Rs. 37,000 for it. But, if he had known that, if he bought the property, he would have had to pay Rs. 64,000 to the mortgagees he would not have bid. Mr. Spencer, an official of the Court, who was acting as bailiff at the time of the sale, was another witness for the plaintiff, but was less certain than the others as to what was said, and his evidence was described by the Court of first instance as "vacillating." What he said sufficiently appears from the judgment of Mr. Justice Irwin on appeal. Mr. Innes' evidence was not taken as he was ill at the time the case was heard:—

The Judge, who tried the case (Begge J.), said:—

"The plaintiff soon after the sale informed the officiating bailiff, according to the report made on the day of sale, that he was not aware that the words 'subject to the mortgage' meant that he was responsible for the aggregate amount of the mortgages as well as for the amount of his bid; and the officiating bailiff, instead of proceeding under section 396 of the Civil Procedure Code, put in his report I have referred to, in which he said that, as the bidders' statements

that they 'were bidding under a misapprehension appears to be perfectly genuine,' he thought it was his duty to refer to the Court for orders whether, under the circumstances, the sale should be set aside, and the property put up for sale again. Of course the Court could not give any such 'orders.'"

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And he was of opinion that—

"Even if the words spoken by Mr. Innes were used, an intimation that the property was to be sold free of mortgages cannot by any process of interpretation be found in them directly, or inferred from them indirectly."

After commenting on the evidence of the plaintiff's witnesses, the Judge said :—

"I give Mr. Spencer credit for trying to give straightforward evidence, and acquit him of all intention of trying to deceive me: but it is obvious that such confused and incoherent testimony is perfectly useless. Hadji Shah Mahomed Ali has not been called: and I have nothing to say against the discretion of plaintiff's counsel in that respect. But the absence of Innes' evidence is a serious omission as regards the proof of the Hindustani words said to have been used by him, though, as I have said, even if they were proved to demonstration, they would not prove, or even suggest, that the plaintiff had been induced to bid under the belief that the property was to be sold free of the mortgages, or, in other words, that he had been induced to buy by misrepresentation. Innes was summoned as a witness, and I was told late in the hearing on the 7th of June that he was ill, but, of course, it was then out of the question to grant any postponement. It has not been proved that he did, in fact, use the words relied on, and if he had—as I have said—they could not have raised the impression under which the plaintiff wishes me to believe he bid, and ultimately became the purchaser. Consequently there is no proof, or indeed suggestion, that his conduct caused, however innocently, the plaintiff to make a mistake as to the substance of the thing, which is the subject of the agreement."

"The plaintiff has made out no case for relief under section 35 of the Specific Relief Act, as the contract of sale is not voidable or terminable by him. As for section 36 of the same Act, I do not think there was any mistake at all. The terms, under which the property was sold, were clearly set out in the proclamation, which was made in the language of the Court as required by section 287 of the Code of Civil Procedure, and which had been previously advertised; and, if the plaintiff did not take the trouble to ascertain clearly under what terms he was bidding, that was his fault and no one else's, and he must take the consequences of his own carelessness."

The suit was therefore dismissed.

The appeal was heard by a Divisional Bench of the Court consisting of Irwin and Hartnoll JJ. The material portions of whose judgments were as follows :—

"IRWIN J. I think there can be no doubt at all that the plaintiff believed that the land was being sold free of the mortgages. He values the land at

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Rs. 40,000. Another bidder, Isaac Sofaer, says it is not worth more than Rs. 40,000 to Rs. 45,000. This evidence receives the best possible corroboration from the bailiff's report made on the day of sale, viz: 'Their statements (of the three bidders) that they were bidding under a misapprehension appear to be perfectly genuine, and as the property in my opinion is not worth more than Rs. 40,000 to Rs. 45,000 at the most, I think it my duty,' etc. It is preposterous to suppose that any sane man would bid several thousands of rupees for an equity of redemption, which he believed to be worth less than nothing. The plaintiff's statement that he would not have bid a pie, if he had known that the property was sold subject to four mortgages, must be held to be perfectly true.

"This brings me to the two issues involved in the main question. Was the mistake caused by what the assistant bailiff said before the sale?

"On the one hand, the certainty that the plaintiff and the other bidders were under a misapprehension raises a considerable probability that there was a reasonable cause for that misapprehension. On the other hand, the extreme levity, with which the plaintiff entered on this important transaction, suggests that he may have made a mistake without any adequate cause. One would expect that an average man of business, before offering a large sum of money for any property, would take some effective means to ascertain exactly what was being sold and would make some examination of the seller's title. But what does the plaintiff say? 'I heard of the sale on the day of the auction, as I was going along the road in a ghari. A Court peon called to me and said a Court sale was taking place. I went to the spot.' He knew no English, and the few words set out in Hindustani above was the only information he got. To bid a large sum under such circumstances as these might almost be called frivolity. I have no sympathy whatever with the plaintiff, and I think he richly deserved to lose heavily over the transaction.

"On the question what were the exact words used by the assistant bailiff, it is unfortunate that he was not examined, but no inference adverse to the plaintiff can be drawn from his absence. He was duly summoned, and was reported absent from illness."

After commenting on the evidence of the plaintiff's other witnesses the Judge said:—

"The evidence of Mr. Spencer, acting bailiff, is fully described by the learned Judge as extremely vacillating, but with all respect I cannot agree in thinking it is perfectly useless. Mr. Spencer was present. He was in charge of the sale and was responsible for the conduct of the sale, although his assistant was the actual auctioneer. The primary cause of the present unfortunate litigation was Mr. Spencer's omission to obey the plain directions contained in section 306 of the Civil Procedure Code when the deposit of 25 per cent. was not paid. This was bad enough, but his official competency must appear in a much worse light if the plaintiff succeeds in proving that he was misled by Mr. Innes' words spoken in Mr. Spencer's presence and without any attempt made by Mr. Spencer to put him right. Mr. Spencer has a strong motive for making his evidence as little damaging as possible to himself

and his assistant; and that I take to be the cause of the vacillation in his evidences. Mr. Justice Bigge acquitted him of all intention of trying to deceive, and so do I; but the motive alluded to above must have had an effect on him, and in my opinion much weight should be given to any admissions he makes in favour of the plaintiff. He first said that Innes said 'Char mortgage hai is ko upar;' but his final statement on this point was 'I cannot say for certain that Innes before the sale used the words, 'Char mortgage hai; is wasto Court ka hukum se bikri hota hai.' It seems to me, considering the position Mr. Spencer was in, that, if he could have flatly denied that Innes used the words 'is wasto,' he would have done so, and therefore I think his evidence goes a long way to corroborate the plaintiff.

"Notwithstanding the careless and irresponsible way in which the bidders behaved, I think it is proved that the assistant bailiff used the words attributed to him by the plaintiff

"I am quite unable to agree with the learned Judge on the Original Side in thinking that the words in question could not bear the meaning the plaintiff assigns to them. I do not claim to be a good Hindustani scholar, but the sort of mixed patois, which Innes spoke, is quite familiar to me, and the use of the words 'is wasto' would cause me to think that the land was being sold at the instance of the mortgagees. This is the meaning assigned to the words by four witnesses, and the fifth, Mr. Spencer, actually says, 'I think any reasonable man would have thought that the land was being sold free of mortgages, had he not read the proclamation.' I may add that considering Mr. Spencer's knowledge of the value of the land he can have had no doubt while the bidding was going on, if he thought of the matter at all, that all the bidders were under a misapprehension. He cannot have thought that they were all irresponsible lunatics.

"The suit was based on section 19 of the Contract Act. My finding on the facts is that plaintiff was induced to bid for the land by misrepresentation as defined in section 18, clause (3) of the same Act. But I have also found that the plaintiff had the means of discovering the truth with ordinary diligence and that he was culpably careless in failing to ascertain the truth in the obvious way, namely, by having the proclamation read and carefully translated to him. That being so, the exception to section 19 of the Contract Act puts him out of Court and the contract is not voidable by reason of the misrepresentation."

HARTNOTT J. I take the same view of the facts as my learned colleague and I have no doubt that the bidders were bidding under a misapprehension. There is evidence, the reliability of which there is no ground for questioning, that the property free of encumbrances was not worth more than Rs. 40,000 to Rs. 45,000, and it is impossible to believe that appellant and Sofaer would have made the bids they did if they had known that they would have to take it subject to the heavy mortgages existing on it. In my opinion, the words alleged to have been used by the deputy bailiff are proved to have been so used. They are a mixture of English and Hindustani and their tenor is—'There are four mortgages. On this account (or therefore) there is a sale by order of Court. The title deeds can be seen in the Office of the Registrar.'

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of supreme importance, which the learned Judges of the Chief Court entirely disregarded.

It has been laid down again and again that in sales under the direction of the Court it is incumbent on the Court to be scrupulous in the extreme and very careful to see that no taint or touch of fraud or deceit or misrepresentation is found in the conduct of its ministers. The Court, it is said, must at any rate not fall below the standard of honesty which it exacts from those on whom it has to pass judgment. The slightest suspicion of trickery or unfairness must affect the honour of the Court and impair its usefulness. It would be disastrous, it would be absolutely shocking, if the Court were to enforce against a purchaser misled by its duly accredited agents a bargain so illusory and so unconscientious as this

Their Lordships are somewhat surprised to find that the learned Judges have nothing to say on this aspect of the case. They are still more surprised at the moral lesson, which the presiding Judge draws from the story of this auction. He points out that the appellant made no investigation into the title beforehand and that he had absolutely nothing to depend upon but the announcement of the auctioneer. And his conclusion is that the appellant "richly deserved to lose heavily over the transaction."

Mr. Spenceer was of course wrong in not keeping a stricter watch on the proceedings of his subordinate, but he was perfectly right in referring the matter to the Court. Both Courts censure him for not having proceeded under section 306 of the Civil Procedure Code. But that course was out of the question. If the truth had been published, nobody but a lunatic would have bid on the property being put up again. If the truth had been kept back, there would have been a gross and deliberate fraud. In either case a claim against the present appellant would have been both dishonest and futile.

Their Lordships think that the appeal should be allowed, the order of the Court of Appeal and the judgment of the Lower Court discharged with costs, to be paid by the judgment-debtor,

and a decree made setting aside the sale with costs against the judgment-debtor.

Their Lordships will therefore humbly advise His Majesty accordingly.

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The judgment-debtor must pay the costs of the appeal.

Appeal allowed.

Solicitors for the appellant: *Bramall & White.*

PRIVY COUNCIL.

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P. C.*
1904November 12,
December 15.

[On appeal from the High Court at Fort William in Bengal.]

to the sale being confirmed, then made an application under section 244 for restoration to possession on the ground that the High Court had by its decree on appeal so modified the decree of the Subordinate Judge as to render the sale under it illegal. The Subordinate Judge held that the application was not one within the purview of section 244; that it was barred by limitation; and that the decree of the High Court did not invalidate the sale, and dismissed the application.

The High Court on appeal, holding that the application was rightly made under section 244, and was not barred; and that the sale under a decree, which was subsequently substantially altered on appeal, could not be otherwise than bad, reversed the Subordinate Judge's decree, and directed that possession should be restored to the respondents, but refused to disturb the possession of the appellants pending the appeal to His Majesty in Council.

Held, by the Judicial Committee that the decree of the High Court was inconsistent with its order of 18th April 1904 giving the appellants possession.

* *Present*—Lord Macnaghten, Lord Atkinson, Sir Andrew Scoble, and Sir Arthur Wilson.

against which no appeal had been brought, and which could not be treated as null and void; that to allow the respondents to take advantage of the error in the decree of 27th January 1904 would entail expense and delay; that the merits of the case were not with them; and they had not offered to redeem the property.

Their Lordships therefore allowed the appeal, and restored the decree of the Subordinate Judge.

APPEAL from a decree (2nd June 1905) of the High Court at Calcutta, which reversed a decree (16th July 1904) of the Subordinate Judge of Mozufferpore.

The decree-holders were appellants to His Majesty in Council.

The principal question for determination in this appeal was as to the validity of a sale held in execution of a decree on 18th August 1903.

On 25th September 1899, the judgment-debtors, the present respondents, mortgaged the properties the subject of the sale to the decree-holders, who brought a suit on the mortgage and on 20th December 1900, obtained the ordinary decree for sale from the Court of the Subordinate Judge of Muzafferpore. The judgment-debtors did not appeal from that decree; but the decree-holders preferred an appeal on the ground that they were entitled to a larger sum under the mortgage than had been allowed them by the Subordinate Judge. On 27th January 1904, the High Court allowed the appeal and made a decree for sale, conditional upon payment within six months, of Rs. 1,56,329.

Whilst that appeal was pending the decree-holders applied on 20th and 21st August 1901 to the Subordinate Judge for an order absolute for sale under section 89 of the Transfer of Property Act (IV of 1882). The applications were refused, but on application to the High Court the Subordinate Judge was, on 14th April 1902, directed to make an order absolute for sale, which he did on 14th August 1902. In pursuance of that order the property was put up for sale, and, on 18th August 1903, purchased by the decree-holders: on 14th September 1903 objections to the sale were raised by the judgment-debtors under sections 244 and 311 of the Civil Procedure Code (Act XIV of

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1882), but they were dismissed, and on 4th January 1901 the Subordinate Judge confirmed the sale. The judgment-debtors appealed from that order to the High Court and also opposed attempts by the decree-holders to obtain possession of the property purchased, but as to the possession the High Court on 18th April 1901 decided that the decree-holders were entitled to possession, and in May 1901 they were duly put into possession of the properties by the Court.

On 10th May 1901, the judgment-debtors made an application to the Subordinate Judge, which gave rise to the present appeal. It purported to be made under section 214 of Act XIV of 1882 and asked for a restoration to possession of the properties by setting aside the sale of 18th August 1903. The ground for setting it aside was stated to be the fact that on the decree-holders appeal to the High Court, that Court had by the decree of 27th January 1901 "modified" the decree of the Subordinate Judge dated 20th December 1900 and awarded the decree-holders a larger sum as due under the mortgage.

In answer to that application the decree-holders insisted on the validity of the sale, and urged that the only remedy to set it aside was by application under section 311 of Act XIV of 1882 a remedy, which was barred by limitation and had already been exhausted. They also pleaded that the orders of the High Court, dated 14th April 1902 and 18th April 1904, were final as against the judgment-debtors.

The Subordinate Judge on 16th July 1904 holding that the judgment-debtors could only apply under section 311 of Act XIV of 1882 and that such application was barred by limitation, and also that the decree of the High Court, dated 27th January 1904, did not invalidate the sale, dismissed the application with costs. In his judgment he said :—

"This application has been made only under section 214 of the Code of Civil Procedure, no mention having been purposely made in it of section 311 of the Code, under which only an execution sale is mainly set aside, because on a former occasion, an application under that section, coupled with section 214, had been made to set aside the sale, but was made unsuccessfully. There is now an appeal pending in the High Court against this Court's order, dated

the 4th January 1904, rejecting the last-mentioned application to set aside the sale.

"The judgment-debtors, without withdrawing the appeal mentioned above, have made this application before me under section 244, Civil Procedure Code, on the strength of the ruling in the case of *Chandun Singh v. Ram Deni Singh* (1) and other rulings referred to therein.

"In the first place, I would say that the judgment-debtors' present application to set aside the sale is barred by limitation as it was not made within 30 days from the date of that sale, and no question of fraud having been now raised about it.

"In the second place I do not think that the application under notice is entertainable under section 244, Code of Civil Procedure. It does not come under clause (c) of that section, under which it was made. There is now no question in this case relating to the execution, discharge or satisfaction of the decree or to the stay of execution thereof. The question about the restoration to possession after possession has been taken by the auction purchasers, who are the decree-holders in this case, is not a question provided for by the section above quoted.

"In the case mentioned above the petition to set aside the sale must have been made under sections 311 and 244 of the Code of Civil Procedure. And, therefore, when the Court ordering the sale to be set aside on the ground that the decree, in execution of which that sale was made, was reversed by the Appellate Court, and was not in existence when the sale was made, also rightly ordered the restoration of the property to the possession of the judgment-debtors, who were ousted from it by the said sale. The present case is different from the case mentioned in the ruling. I may further observe that the latter case is distinguishable from the present, inasmuch as in that case there was an appeal against the whole decree, which was wholly reversed, and a new decree was substituted therefor by the Appellate Court. But in the case before me, there was no appeal against the portion of the mortgage decree, which was executed by the decree-holders after it was made absolute, and under which they brought to sale and purchased the judgment-debtors' properties. Therefore, that decree was not reversed. The language of the Appellate Court's order, by which it added to that decree a certain amount, which was not allowed by the Court of First Instance, could not change the substance of the thing. I take that order as directing the addition to the original decree of the amount it decreed in appeal, though it stated that it modified the original decree."

From that decision the judgment-debtors appealed to the High Court, and a Divisional Bench (Rampini and Caspersz JJ.) reversed the decree of the Subordinate Judge and directed that possession of the property should be restored to the judgment-debtors on the ground that the sale was invalid as the only

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decree capable of execution was that dated 27th January 1904, and that the proper remedy was by application under section 244 of Act XIV of 1882.

The material portion of their judgment was as follows :—

"The judgment-debtors contended before the Subordinate Judge that the sale of the 18th August 1903, held in execution of the mortgage decree, was bad, because that decree was subsequently modified; and they were not bound to pay in the decretal amount until six months from the 27th January 1904. The learned Subordinate Judge has, however, disallowed their objection. He has held (1) that the application of the judgment-debtors is barred by limitation and it was not made within 30 days from the date of the sale, and (2) that their application does not come within the purview of section 244 of the Code of Civil Procedure.

"We think that the order of the Subordinate Judge cannot be sustained.

"If the application of the judgment-debtors had been made under section 311 of the Code of Civil Procedure, no doubt the period of limitation would be 30 days; but the application being under section 244, the period of limitation is not 30 days, but 3 years.

"Then, we do not think that the learned Subordinate Judge is right in holding that the application does not come within the purview of section 244. It is certainly, in our opinion, an application relating to the execution, discharge and satisfaction of a decree; and, furthermore, we think that the sale of the 18th August 1903, under a decree, which was subsequently altered by this Court—and altered very substantially—cannot be held good. The decree, which alone can be executed in this case, is the decree of the 27th January 1904. That decree gave the judgment-debtors six months' time to redeem the property in and the sale, which was held about a year before that period had expired, must be bad.

"We therefore decree this appeal and set aside the sale of the 28th August 1903, as also the proceedings delivering possession of the property to the decree-holders."

On this appeal, which was heard *ex parte*—

DeGruyther, K.C., and *S. A. Kyffin* for the appellants, contended that the High Court was in error in holding that the sale of 18th August 1903 was bad by reason of the decree under which the sale took place having subsequently to such sale been modified on appeal in favour of the appellants: the sale, it was argued, was valid and was not rendered illegal by the decree dated 27th January 1904 of the High Court on appeal by the appellants. All that the High Court had power to do on that appeal was to deal with the amount awarded by the Subordinate Judge; for, the respondents not having

appealed from, or filed objections to it, the rest of the Subordinate Judge's decree was final. A Court could not of its own motion deal with a portion of a decree against which portion there had been no appeal and no objections filed. Extending the time for payment of the decretal amount, as the High Court did in its decree of 27th January 1904, was an illegal exercise of its jurisdiction, and an order which that Court had no power to make under the Transfer of Property Act (IV of 1882). Reference was made to *Cheda Lal v. Badullah* (1); Transfer of Property Act, sections 88, 89, 93, and Civil Procedure Code (Act XIV of 1882), section 545 and Schedule IV, Form No. 128. There was therefore, it was submitted, no such modification by the High Court of the decree of the Subordinate Judge dated 20th December 1900, in its decree of 27th January 1904 as invalidated the sale of the property purchased by the appellants.

The only procedure to set aside the sale was by application under section 311 of the Civil Procedure Code, but that remedy had been exhausted and was barred by lapse of time. The application now under appeal, so far as it asked for the setting aside of the delivery of possession of the property to the appellants, was not one which came within the provisions of section 244 of the Civil Procedure Code, and the High Court ought so to have held.

The orders of the High Court, dated 14th April 1902 under which the order absolute for sale of the property was made, and 18th April 1904 ordering possession to be given to the appellants, were final as against the respondents and could not now be disputed; yet the judgment of the High Court now under appeal was quite inconsistent with those orders, which were binding on the respondents. The position of the parties was somewhat analogous to that in *Mungul Pershad Ditchit v. Grija Kant Lahiri* (2). In any case the respondents could not be entitled to possession without redeeming the mortgage, dated 25th September 1899. The decree of the High

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(1) (1888) I. L. R. 11 All. 35, 38.

(2) (1881) I. L. R. 8 Calc. 51, 60; L. R. 8 I. A. 123, 132.

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Court appealed from should be set aside and that of the Subordinate Judge restored.

The judgment of their Lordships was delivered by—

LORD MACNAGHTEN. This appeal was heard *ex parte*. It certainly presents something like a puzzle owing to complications which have resulted from an error committed by the appellants at one stage of the proceedings. On the whole, however, their Lordships are of opinion that the appeal ought to succeed.

On the 20th of December 1900, the appellants obtained from the Subordinate Judge of Mozufferpore an ordinary decree for a sale of some mortgaged property. The amount for which the decree was passed was Rs. 1,14,000. The appellants' claim was for a considerably larger amount. They appealed to the High Court for a modification of the decree on the ground that the amount allowed was inadequate.

In August 1901, before the appeal to the High Court came on for hearing, the appellants applied to the Subordinate Judge for an order absolute for sale. The Subordinate Judge refused the application pending the appeal. But the High Court, on the petition of the appellants, directed the Subordinate Judge to make the necessary order. In their judgment the learned Judges of the High Court say—

"It is suggested that in the appeal to this Court there may be an order or a decree for a further sum in favour of the petitioners and some confusion may result. But we have not to consider that matter at present, nor is it clear that any confusion will arise."

On the 14th of April 1902 the order absolute was made. The property was put up for sale on the 18th of August 1903. It was purchased by the appellants. The sale was confirmed on the 4th of January 1904. But the Subordinate Judge, on the objection of the respondents, refused to put the appellants in possession.

On the 27th of January 1904, the appeal of the present appellants from the original decree of the 20th of December

1900 came on to be heard. The Court made an order modifying the decree in the appellants' favour, directing the respondents to pay the whole amount adjudged within six months, and, in case of default, directing the property to be sold.

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The next important date is the 18th of April 1904, when an appeal from the refusal of the Subordinate Judge to put the appellants in possession of the property was heard. The High Court, after hearing both parties, decided that the appellants were entitled to possession. They were accordingly put into possession and have remained in possession ever since.

As the respondents were represented by counsel or pleaders on that occasion, it cannot be doubted that the attention of the High Court was called to the fact that the six months allowed by the decree of the 27th of January 1904 had not expired, and that the sale had taken place under a decree of the Subordinate Judge inconsistent with the subsequent decree of the High Court.

The objection was apparent. It could not have been overlooked. How the High Court dealt with it does not appear. It may not have been pressed by the respondents, or the High Court may have been satisfied that, under the circumstances of the case, the form of the decree was a mere slip on the part of the appellants, or the Registrar of the Court, which misled nobody.

The next step was that the respondents, on the 19th of May 1904, applied to the Subordinate Judge claiming restoration to possession by setting aside the sale of the 16th of August 1903. The Subordinate Judge dismissed the application with costs. On appeal, however, to the High Court that Court reversed the decree of the Subordinate Judge, set aside the sale, and directed that possession of the property should be restored to the respondents.

From that decree the appellants have appealed to His Majesty in Council. Pending the appeal the High Court has refused to disturb the possession of the appellants, observing that "the case is in its circumstances very peculiar."

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The appellants take their stand on the order of the High Court of the 18th of April 1904. Their Lordships think that the appellants are right and that the order now under appeal is inconsistent with the order of the 18th of April 1904, against which no appeal was brought, and which, in their Lordships' opinion, ought not now to be treated as null and void.

The merits of the case are not with the respondents. If they were allowed to take advantage of the error in the decree of the 27th of January 1904, it would only lead to expense and delay. They have not offered to redeem, and probably are not in a position to redeem, the property.

Their Lordships will therefore humbly advise His Majesty that the appeal ought to be allowed and that the order of the 2nd of June 1905 ought to be discharged, but without costs, and the decree of the Subordinate Judge of the 16th of July 1904 restored, and that any costs paid under the order of the 2nd of June 1905 ought to be repaid. Their Lordships do not think it is a case for giving the appellants any costs of the appeal.

Appeal allowed.

Solicitors for the appellants: *T. L. Wilson & Co.*

J. V. W.

APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis W. Maclean, K.O.I.E., Chief Justice, Mr. Justice Harington and Mr. Justice Fletcher.

ABU MAHOMED

v.

S. C. CHUNDER.*

1909
January 13.

Assignment—Claim for damages for breach of contract—Right of assignee to sue—Transfer of Property Act (IV of 1882), ss. 3, 6 (c), 130—"Actionable claim"—"Mere right to sue."

A claim for damages for breach of contract, after breach, is not an "actionable claim" within the meaning of section 3 of the Transfer of Property Act, but a "mere right to sue" within the meaning of section 6 (c) of the same Act, and therefore cannot be transferred [Per Maclean C J. and Harington J., Fletcher J. *dubitante*.]

APPEAL by the plaintiff Abu Mahomed, from the judgment of Stephen J.

By a contract, dated December 2nd, 1904, Messrs. Ebrahim Haji Sulaiman & Co. purchased from the respondent S. C. Chunder 225,000 gunny bags for delivery in equal portions during the months of January to May 1905, each month's delivery to be considered a separate contract. Delivery was duly given of the January and February portions, but the respondent failed to give delivery of the March instalment to Messrs. Ebrahim Haji Sulaiman & Co., who thereby sustained damage to the extent of Rs. 1,112-8, being the difference between the contract price of the goods and the market price prevailing on March 31st, 1905.

The purchasers, Messrs. Ebrahim Haji Sulaiman & Co., subsequently became insolvent and the estate and credits of the firm vested in the Official Assignee of Bombay. By a deed of assignment, dated June 6th, 1906, the Official Assignee assigned "all actionable claims arising from the transactions of the Bombay and Calcutta firms, whether entered in the books

* Appeal from Original Civil No. 58 of 1903.

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or not, and the benefits of all contracts entered into by the Bombay and Calcutta firms of Ebrahim Haji Sulaiman & Co.," to one Sulleman Cassim Peroo Mahomed, who again assigned the same to the appellant Abu Mahomed by a deed of assignment dated July 6th, 1906.

Abu Mahomed thereupon instituted this suit for the recovery of the sum of Rs. 1,112-8, the amount of damage which had resulted from the breach by the respondent of the contract of the 2nd December 1901. It was pleaded in defence that the plaintiff had no cause of action and that the suit was not maintainable. On the 6th August 1908, Stephen J. dismissed the suit holding that as the plaintiff was a transferee merely of a right to sue, he could not maintain the action. His Lordship's judgment was as follows:—

STEPHEN J. In this case Ebrahim Hajee Sulaiman in December 1901 entered into a contract with the defendant for the supply of a quantity of B. twills to be delivered in four monthly consignments. Pursuant to this contract two monthly consignments were delivered in January and February. The one of the 31st March 1903 was not delivered on which Ebrahim Hajee Sulaiman purchased goods in the market and as he says at the price of Rs. 1,112-8, above the contract price, Ebrahim Hajee Sulaiman then became insolvent and the Official Assignee conveyed his outstandings, assets and his interest in the execution of the contract to a purchaser, who assigned them on the 6th of July 1906 to the plaintiff. The plaintiff now sues for the Rs. 1,112-8, which are said in fact to be damages sustained by Ebrahim Hajee Sulaiman and which is the amount assessed as damages in the assignment to the plaintiff. It is objected on behalf of the defendant that the plaintiff shows no cause of action, that the claim for damages is not an actionable claim under section 3 of the Transfer of Property Act, that Ebrahim Hajee Sulaiman's claim as to damages was a mere right to sue so far as he was concerned and, if anything vested in the Official Assignee, it cannot be more than a mere right to sue with regard to the contract in question. Therefore it is argued nothing passed from the Official Assignee to the assignor of the plaintiff or consequently afterwards to the plaintiff. This contention seems to me to be sound. The claim in question cannot be an actionable claim because it is not a claim for liquidated damages, consequently there is no doubt it comes within the meaning of section 3 of the Transfer of Property Act and it also seems to me impossible that after the 31st March Ebrahim Hajee Sulaiman had anything except a mere right to sue. The contract, so far as the March delivery was concerned, was discharged by a breach on the 31st March and it then ceased to exist. Ebrahim Hajee Sulaiman then had a claim for damages and that claim is the same thing as the right to sue. I cannot

see how he or anybody deriving any right from him can have anything more than this

It has been argued before me that clause (c) of section 6 of the Transfer of Property Act was enacted in order to prevent champertous suits, but I hold there is nothing at all in the Act to lead me to confine the operation of sub-section (c) to such suits and I must take the words as I find them. In taking this view of the case, I am considerably fortified by the judgment in *May v. Lane* (1). The question there depends on the construction of sections of the Judicature Act and the facts are not altogether similar to those of the present case. But applying the principles there laid down, I cannot hold that the present plaint does disclose any cause of action.

The suit is consequently dismissed with costs.

From this judgment, the plaintiff appealed.

Mr. Garth (*Mr. Sircar* with him) for the appellant. It is conceded that a mere right to sue cannot be assigned. But the claim in this suit is an "actionable claim" within the definition given in section 3 of the Transfer of Property Act, read with section 130, which includes within its purview "all the rights and remedies, whether by way of damages or otherwise." Section 130 of the Transfer of Property Act goes beyond section 25 of the Judicature Act and cannot be confined to debts only. At the date of the assignment the amount of damage had been ascertained. In *Jaffer Meher Ali v. Budge-Budge Jute Mills Co.* (2), *Salo J.* held that a contract for the purchase of gunny-bags was assignable, and this decision was not disturbed on appeal (3), and has been followed in *Nathu v. Hansraj* (4). See also *Torkington v. Magee* (5), although I submit that English authorities on this point have not much force in this country. The doctrine in *May v. Lane* (1) can have no application here. Moreover, the *dictum* in *May v. Lane* (1) has been considered in *Dawson v. Great Northern and City Railway* (6) and has been interpreted to mean that equity will not allow an assignment by way of champerty. This principle has no application in India. The last-mentioned case was the case of a claim to compensation under the Lands Clauses Act

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(1) [1894] 64 L. J. Q. B. 236.

(2) (1906) I. L. R. 33 Calc. 702.

(3) (1907) I. L. R. 34 Calc. 289.

(4) (1906) 9 Bom. L. R. 114.

(5) [1902] 2 K. B. 427.

(6) [1905] 1 K. B. 260, 270.

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and it was held such claim was assignable. There is no distinction between such a claim and a claim to damages under a contract as in the present case. [Fletcher J. referred to *William Brandt's Sons & Co. v. Dunlop Rubber Company* (1), and *Swan and Cleland's Graving Dock and Slipway Company v. Maritime Insurance Company and Croshaw* (2). The Judicature Act did not take away the rights of assignment that existed before the Act. If this is not an "actionable claim," you stand in the same position as you would have stood before the Transfer of Property Act. There is no section in the latter Act to cover the transfer of sums to become due in the future. Does that not shew that the Transfer of Property Act is not exhaustive ?] My submission is that the claim was assignable under the Transfer of Property Act, and in the alternative, if the claim does not fall within the Act, it was assignable in equity. There is no distinction in principle between the assignability of a contract, and the assignability of a claim to damages under a contract

1 *Mr. Dunne (Mr. A. N. Chaudhuri with him) for the respondent.* There can be no question here of adding parties. The case as made is on an absolute assignment. and, if the claim is not assignable, the appellant must fail.

The question in issue is whether a claim to damages resulting from a breach of contract, is assignable after breach, whether (i) under the Transfer of Property Act, or (ii) in Equity. I submit the Transfer of Property Act is exhaustive and deals with all the means of transfer in India. Section 3 defines an "actionable claim," which is assignable under section 130. These two sections contemplate the assignment of the benefit of a contract *before breach*. See *Jaffer Meher Ali v. Budget-Budge Jute Mills Co.* (3). The words "whether by way of damages or otherwise" in section 130, mean that the beneficial interest in a contract includes the right to recover damages for its breach. A debt or a beneficial interest in a contract is

(1) [1905] A. C. 454.

(2) [1907] 1 K. B. 116.

(3) [1907] L. L. R. 34 Cal. 289.

moveable property, but in the present case, there was no assignment of any contract : the contract was exhausted and discharged by breach, and all that was left, was a mere right to sue for damages. See Leake on Contracts, 5th edition, page 616. A right to recover damages for breach of contract is not assignable. See *May v. Lane* (1), in which the dictum though obiter has the authority of such eminent lawyers as Esher M. R. and Rigby L. J. *Torkington v. Moger* (2) did not overrule *May v. Lane* (1), but was distinguished. The decision in *Dawson v. Great Northern and City Railway* (3) was on a totally different ground, and nowhere was any doubt cast on the doctrine as laid down in *May v. Lane* (1). In *William Brandt's Sons & Co. v. Dunlop Rubber Company* (4) the assignment was one of a debt, which is obviously a chose in action and would fall within section 3 of the Transfer of Property Act. All that *Siegn and Cleland's Graving Dock and Slipway Company v. Maritime Insurance Company and Croshaw* (5) held was that the doctrine in *May v. Lane* (1) did not apply to a policy of maritime insurance [Fletcher J. referred to *King v. Victoria Insurance Company* (6).] That case did not turn on the question of assignment : the Insurance Co. were subrogated to the rights of the assured. Cases which have considered *May v. Lane* (1) and distinguished it, have pointed out that the doctrine in that case must not be interpreted too widely so as to cover cases of the assignment of the benefit of contracts including the right to sue thereunder, but no case has challenged the proposition that after breach of contract, the right to sue for damages for such breach cannot be assigned.

Mr. Garth, in reply. The assignment in the present case was not merely of the right to recover damages as in *May v. Lane* (1), but of the benefits of a contract, in respect of which the assignor had certain rights to recover damages. Breach discharges a contract only in a certain sense : the con-

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(1) (1894) 64 L. J. Q. B. 236

(2) [1902] 2 K. B. 427.

(3) [1905] 1 K. B. 280.

(4) [1905] A. C. 454

(5) [1907] 1 K. B. 116, 123

(6) [1896] A. C. 250.

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tractual rights still obtain for certain purposes, e.g., founding a right of action on the contract.

MACLEAN C. J. The facts of this case lie within a very narrow compass: It appears that by a contract dated the 2nd of December 1901, Messrs. Ebrahim Hajee Sulaiman & Co. purchased from the defendant a certain quantity of B. twills,—so many hundred bags; delivery from January 1905, so many bags a month. Certain of those bags were delivered in pursuance of the terms of the contract, but in March 1905 the defendant did not deliver the bags deliverable for that month, and loss, as the plaintiff says, resulted to the purchasers from that default on the part of the vendor. The purchasers, Messrs. Ebrahim Hajee Sulaiman & Co., eventually became insolvent, and the Official Assignee of Bombay conveyed the outstanding assets and their interests in the executory contracts to one Sulaiman Cassim Peroo Mahomed, who again assigned his interest in those contracts to the plaintiff by an assignment deed, dated the 5th of July 1906. The Official Assignee by his assignment, which is dated the 6th of June 1906, assigned “all actionable claims arising from the transactions of the Bombay and Calcutta firms, whether entered in the books or not, and the benefits of all contracts entered into by the Bombay and Calcutta firms of Ebrahim Hajee Sulaiman and Company,” to Sulaiman Cassim Peroo Mahomed; and he assigned the same over to the plaintiff. The plaintiff then brought this action: and the first point taken and successfully taken by the defendant is that the plaintiff cannot maintain the suit: and Mr. Justice Stephen held that, as the plaintiff was a transferee merely of a right to sue, he could not maintain the action.

The question we have to decide depends upon two or three short considerations. As I have noticed the contract had been broken and the right to damages had accrued before anything was vested in the Official Assignee under the insolvency: that of course is a very material feature in the case.

The first question is whether, as regards the particular case we are dealing with, that which the plaintiff purchased was a mere right to sue, or if it were not that, what it was. Under section 6 of the Transfer of Property Act, the Statute enacts that "a mere right to sue cannot be transferred" and, it is noticable that the language of that section is much wider than was the language of the corresponding section in the Transfer of Property Act, which was thereby repealed. If this was a mere right to sue, it cannot be transferred. Now what can be transferred under the Act? Any actionable claim can be transferred: and section 130 points out how it may be transferred. What is an actionable claim? If we look at section 3 'an "actionable claim" means a claim to any debt': but this is not a claim to any debt; this is a claim to damages of an unascertained amount resulting from a breach of contract on the part of one of the parties to that contract. Is it then a "claim to any beneficial interest in moveable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognise as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional, or contingent?" I do not think that we can properly bring a mere claim for damages for breach of contract within these words. Now, if it does not fall within the definition of "actionable claim," what is it except a mere right to sue, a mere right to sue for damages resulting from an alleged breach of contract. It seems to me that it is not anything more or less than that; and if so, that cannot be transferred.

It is clear, whatever the principle may be underlying it, that according to the English law an assignment of damages for an alleged breach of contract would not entitle the assignee to sue; and, if one may speculate, the words, "a mere right to sue cannot be transferred" in the Transfer of Property Act are based upon the same principle. However in these cases we must ascertain what the law in India and not in England here enjoins. I have referred to the sections of the Transfer of Property Act, which deal with the matter. In

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this view it does not seem necessary to discuss the English authorities, which have been cited, though several of them appear to be in accord with the view I have stated.

For these reasons Mr. Justice Stephen's view seems to be right and the appeal must be dismissed with costs.

HARINGTON J. I agree, and I think the position of the seller and the buyer at the expiration of the month of March was this—the seller had to deliver certain goods and he had failed to do so. The result was that the benefit with regard to the contract for delivery during the month of March was at an end; and all that the buyer was to do was to sue the seller for damages for breach of the contract, which the seller had failed to perform. Some months after the breach of this contract, the present plaintiff became, under a deed of assignment, entitled *inter alia* to the actionable claims to which the original buyer was entitled. The question really resolves itself into this: was this right to recover damages for the breach of contract, which could no longer be fulfilled, an actionable claim or merely a right to sue. In my opinion, it was merely a right in the buyer to sue for such damages as he might be able to prove he had sustained. Those damages might merely be nominal or, on the other hand, they might be substantial. If that were so, then that right could not be passed under the assignment, by virtue of the provisions of section 6 of the Transfer of Property Act, clause (e) and, moreover, the assignment does not purport to pass anything more from the buyer than the actionable claims to which he was entitled. Then, if the definition of 'actionable claim,' given in the Transfer of Property Act is looked at, it is clear, I think, that a right to sue for damages—unascertained damages, consequent upon a breach of contract, does not fall within that definition.

The result is that I agree that the judgment of the learned Judge in the Court of first instance was right and that this appeal should be dismissed.

FLETCHER J. I do not dissent : but I feel very considerable doubt that the Statute meant to limit the right of a person to assign his right under a contract by the fact that the other party to the contract had broken it.

Appeal dismissed.

Attorneys for the appellant : *Manuel & Agarwalla.*

Attorney for the respondent : *N. G. Roy.*

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APPEAL FROM ORIGINAL CIVIL

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Harington and Mr. Justice Brett.

1908

December 2.

BURN & Co.

v.

McDONALD.*

Contract—Injunction—Breach of contract—Contract of personal service—Agreement—Absence of negative agreement—Negative covenant implied—Specific Relief Act (I of 1877), s. 57, also illustration (d)—Restraint of trade—Damages—Contract Act (IX of 1872), s. 74—Codified law.

By an agreement made in England, M. was engaged by B. & Co. a firm of Engineers in Calcutta, as an assistant to their firm for a period of 5 years, and it was *inter alia* agreed that "he should diligently and to the best of his ability devote himself to the duties incumbent on him and should faithfully observe and comply with such instructions as he might from time to time receive from the firm." During the term of his engagement, M. left the employ of B. & Co. and entered that of another firm. On a suit, instituted by B. & Co., for an injunction to restrain M. from serving, working or being employed by any other person or persons and for damages.

Held, although there was no negative condition in terms in the agreement, a negative covenant could be properly implied, under section 57 of the Specific Relief Act, and illustration (d) thereto, which gave legislative sanction in India to the law as laid down by Selborne L. J. in *Wolverhampton and Walsall Railway Company v. London and North-Western Railway Co.* (1).

Charlesworth v. MacDonald (2) approved.

Lumley v. Wagner (3), *Whitwood Chemical Company v. Hardman* (4), *Ehrman v. Bartholomew* (5) referred to.

Where the law has been codified, it is of little avail to enquire what is the law apart from such codification: the Code itself must be looked to as the guide in the matter.

As the contract had been most deliberately broken the plaintiffs were entitled to an injunction according to the principles of equity, justice and good conscience.

APPEAL FROM ORIGINAL SUIT.

APPEAL by the plaintiffs, Burn and Co., from the judgment of Fletcher J.

* Appeal from Original Civil No. 460 of 1908 in Suit No. 241 of 1908

(1) (1873) L. R. 16 Eq. 423, 440. (3) (1852) 5 De. G. and S. 495.

(2) (1898) L. L. R. 23 Bom. 103, 113. (4) [1891] 2 Ch. 416.

(5) [1898] 1 Ch. 671.

This action was instituted by Messrs. Burn and Co., Ltd., a firm of engineers carrying on business in Calcutta, and the neighbourhood, against the respondent, who was formerly one of the assistants employed in their firm, for an injunction and damages for breach of agreement.

By an agreement made in England, and dated the 27th July 1904, between the appellant Company and the respondent, the Company engaged Mr. McDonald as draughtsman and general assistant in its engineering works at Howrah near Calcutta or elsewhere for a period of 5 years from and after the date at which he should begin to work after his arrival at the engineering works at Howrah, it being agreed that he should forthwith proceed to Calcutta, the Company providing him with a second class passago. The respondent's remuneration was fixed at Rs. 250 per month for the first year of his service, with annual increments of Rs. 25, to be paid "monthly or as may be mutually arranged," with certain other allowances.

Certain other clauses in the memorandum of agreement, were as follows:—

(3). "On the arrival at Calcutta of the said Colin McDonald he shall at once report himself at the said engineering works at Howrah aforesaid and enter upon his duties aforesaid and during the said period of this agreement he shall diligently and to the best of his ability devote himself to the duties incumbent on him as aforesaid and shall faithfully observe and comply with such instructions as he may from time to time receive from the said Messrs. Burn & Co., Ltd., or their authorised representative for the time being."

(6). "At any time during the said period of this agreement the said Messrs. Burn & Co., Ltd., shall be entitled to terminate the said engagement and that without assigning any reason for so doing in which event they shall make payment of one month's salary to the said Colin McDonald and payment of a second class passage home to this country, provided always that the obligation to provide such passage shall not be binding or operative, unless the said Colin McDonald shall within one calendar month from the termination of his engagement depart from India with the intention of returning to this country. But in the event of the said dismissal being caused by the said Colin McDonald's (a) insobriety, (b) unpunctuality in attendance to business, (c) carelessness and inattention to or neglect of work or duties, (d) disobedience of orders given by the said Messrs. Burn & Co., Ltd., or his immediate superior, (e) illness brought on or induced by misconduct or disobedience to the Doctor's orders, (f) breach of confidence with reference to any of the business secrets of the firm, (about any of which the said

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 McDONALD. Messrs. Burn & Co., Ltd., or their representative shall be the sole-judge; the said Colin McDonald shall have no claim for salary after having been duly warned on at least one occasion, further than up to the date of his dismissal or for a passage home as before provided for the said Colin McDonald."

(8.) "The said Colin McDonald shall be bound, if and when required by the said Messrs. Burn & Co., Ltd., to assist them in any other department of their business and, if required, to go to any other place in the East in connection with their business."

(10.) "The said Colin McDonald shall be bound, if required, on his arrival at Calcutta to confirm this engagement in conformity with the laws of the place to the effect that the same may be capable of enforcement there."

(12.) "Both parties bind and oblige themselves to perform their respective parts of the premises to each other under the penalty of one hundred pounds to be paid by the party failing to the party performing or willing to perform over and above performance."

It is to be observed there was no express negative covenant in the agreement restraining the respondent from taking service under any other firm, during the term of his employment by Messrs. Burn & Co.

The respondent arrived in Calcutta on the 13th October 1904 and immediately entered upon his duties under the agreement as an assistant of Messrs. Burn and Co. at Howrah, and continued to perform his duties and to be so employed till the 3rd March 1908.

It appears that on the 18th February 1908, Mr. McDonald having secured a post under the firm of Raja Sreenath Roy and Bros., wrote to Messrs. Burn and Co. tendering his resignation and proposing to leave their employment from the 15th March following. On the 19th February 1908, Messrs. Burn and Co., replied declining to accept the resignation and giving Mr. McDonald notice that "they would take legal steps to enforce the terms of his agreement with them." Some further correspondence passed and on the 3rd March 1908, on the respondent's request for his salary for the month of February, he was informed that the office had instructions to withhold his salary for the present. Thereupon, on the 4th March 1908, Mr. McDonald left the service of Messrs. Burn & Co., upon the pretext of the firm's refusal to pay him his

salary for February. On the 17th March 1908, the respondent entered the service of Raja Sreenath Roy & Bros.

On the 21st March 1908, Messrs. Burn & Co. instituted this suit, asking for Rs. 2,000 as damages and for an injunction "to restrain the defendant from serving, working or being employed by the said Raja Sreenath Roy & Bros. or any person or persons other than the plaintiff company, until the said agreement dated the 27th July 1904 should have been determined by effluxion of time, that is, until the 13th October 1909."

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The defendant denied breach of the agreement on his part, and alleged that the company had committed breach of the agreement by compelling the defendant to do various works not contemplated by the agreement, and by their refusal to pay his salary for February 1908 on the 3rd March 1908, and submitted that in any event the company were not entitled to the injunction sought.

The rule *nisi* for an *interim* injunction was discharged by Chitty J. on the 10th April 1908, but an order was obtained expediting the hearing of the suit.

The suit came on for hearing before Fletcher J., who on the 14th May 1908 refused to grant an injunction and gave a decree for Rs. 30 by way of damages, observing—

FLETCHER J. This is a suit brought by Burn & Co., Ltd., against one Colin McDonald, who was formerly one of the assistants employed in their firm, for an injunction and damages for breach of agreement.

The defendant entered into the service of the plaintiffs' firm under an agreement, dated the 27th July 1904, and made in England between one of their authorised agents of the one part and the defendant of the other part. The term of the agreement is for five years commencing from and after the date at which the defendant should begin to work under the agreement after his arrival at the engineering works of the plaintiffs at Howrah.

By the third clause of the agreement it is provided that on arrival of the defendant in Calcutta he shall at once report himself at the said engineering works at Howrah and enter upon his duties and shall diligently and to the best of his ability devote himself to the duties incumbent on him and shall faithfully observe and comply with such instructions as he may from time to time receive from the plaintiffs' firm.

No obligation under the contract is imposed on the plaintiffs to employ the defendant for the period of five years. The contract provides that, if

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the defendant breaks this agreement he shall be liable to a penalty of £100 to be paid to the plaintiffs.

The defendant in his written statement denies that he has committed any breach of the agreement. As I am of opinion that the defendant by leaving the plaintiffs' employ committed a breach of his agreement, I have first to decide whether or not the plaintiffs are entitled to an injunction.

Now, by section 57 of the Specific Relief Act, it is provided that when a contract comprises an affirmative agreement to do a certain act coupled with a negative agreement express or implied not to do a certain act, the circumstance that the Court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement.

From this section it appears first, that there must be in this contract a negative agreement express or implied and, secondly, the jurisdiction conferred on the Court is a discretionary jurisdiction.

Then, first, does the contract contain a negative agreement express or implied?

"Every agreement to do a particular thing in one sense involves a negative. It involves the negative of doing that which is inconsistent with the thing you are to do, but it does not at all follow that, because a person has agreed to do a particular thing, he is therefore to be restrained from doing every thing else, which is inconsistent with it" (per Lindley L. J. in *Whitwood Chemical Company v. Hardman* (1)).

In my opinion, it is impossible to infer from the contract in question a negative agreement by which the defendant undertook that, whether the plaintiffs should or should not continue to employ him, he would not during the period of five years from the commencement of the agreement work for any one else in the world.

But even if I had come to the conclusion that such a negative agreement should be implied I should have held such agreement to be void as being in restraint of trade and being wider than what was necessary for the reasonable protection of the plaintiffs.

The defendant has, however, raised a defence which I had better deal with before I come to the question of damages.

This defence is that the punctual payment of the defendant's salary under the agreement on the first of every month is a condition precedent to his continuing to serve under the plaintiff company. Clause 4 of the agreement provides for payment monthly or as may be mutually arranged, of salary to the defendant at certain rates with allowances during the several years of his employment.

Now what are the facts?

From October 1904 to the 3rd March 1908 the defendant continued to serve in the plaintiffs' firm. Having replied to an advertisement in the papers he secured a post under another firm.

On the 18th February, he gave notice to the plaintiffs that he intended to leave their firm on the 15th March following.

He did not actually join the other firm until the 17th March though he absented himself from the plaintiffs' firm from the 4th March. During the period of that notice at the end of February his pay for February became due, but the plaintiffs stopped his pay to see whether the defendant carried out what he stated to be his intention in his letter of the 18th February.

Considering all the circumstances, I think the plaintiffs were justified in withholding the defendants' pay during the currency of the notice by which the defendant intended to commit a breach of his agreement.

That being so, the suit resolves itself into a question of damages.

Now, what is the measure of damages that the plaintiffs are entitled to?

The plaintiffs' witness says that it costs about Rs. 550 to bring out a new man from England, that Rs. 100 has to be paid to him on the voyage out and about Rs. 350 for advertisement charges, and the agent's fees have to be paid in England. In the present case no special damages can be made out because the plaintiffs' own case is that immediately the defendant left their firm, they employed one Mr. Gildilan in his place, though he is not a permanent hand. He is not drawing a bigger salary than the defendant. It is probable that, if the defendant had performed his agreement, the plaintiffs would, at the end of about another year and a half, have had to bring out another man from England to fill the defendant's place.

The plaintiffs are therefore entitled by way of damages to the interest they will lose by having to lay out this sum earlier than they would otherwise have had to have done. I accordingly award to the plaintiffs Rs. 30 as damages for the defendant's breach of his agreement.

I make no order as to the costs of this suit.

There remains only the question of costs of the plaintiffs having obtained an *ex parte* injunction restraining the defendant from joining and working for the firm of Raja Sreenath Roy. The injunction was subsequently discharged, but the costs were reserved. From the facts disclosed, it appears that the plaintiffs were wrong in obtaining the injunction and they must pay to the defendant his costs of having that injunction discharged.

From this judgment, the plaintiff company Burn & Co., Ltd., appealed.

Mr. Buckland for the appellant company. The facts of this case are entirely covered by section 57 of the Specific Relief Act. The Court can import the negative covenant by the respondent, not to take service under any other firm during the period of his agreement, and has power to grant an injunction restraining him from doing so. See *Madras Railway Company v. Thomas Rust* (1). Illustration 4 to section 57 is to the point. See *Callianji Harjivan v. Narsi Tricum* (2)

(1) (1890) I. L. R. 14 Mad. 18.

(2) (1894) I. L. R. 18 Bom. 702, 708.

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Now, by section 57 of the Specific Relief Act, it is provided that when a contract comprises an affirmative agreement to do a certain act coupled with a negative agreement express or implied not to do a certain act, the circumstance that the Court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement.

From this section it appears first, that there must be in this contract a negative agreement express or implied and, secondly, the jurisdiction conferred on the Court is a discretionary jurisdiction.

Then, first, does the contract contain a negative agreement express or implied?

"Every agreement to do a particular thing in one sense involves a negative. It involves the negative of doing that which is inconsistent with the thing you are to do, but it does not at all follow that, because a person has agreed to do a particular thing, he is therefore to be restrained from doing every thing else, which is inconsistent with it" (*per* Lindley L. J. in *Whitwood Chemical Company v. McGregor* (1)).

In my opinion, it is impossible to infer from the contract in question a negative agreement by which the defendant undertook that, whether the plaintiffs should or should not continue to employ him, he would not during the period of five years from the commencement of the agreement work for any one else in the world.

But even if I had come to the conclusion that such a negative agreement should be implied I should have held such agreement to be void as being in restraint of trade and being wider than what was necessary for the reasonable protection of the plaintiffs.

The defendant has, however, raised a defence which I had better deal with before I come to the question of damages.

This defence is that the punctual payment of the defendant's salary under the agreement on the first of every month is a condition precedent to his continuing to serve under the plaintiff company. Clause 4 of the agreement provides for payment monthly or as may be mutually arranged, of salary to the defendant at certain rates with allowances during the several years of his employment.

Now what are the facts?

From October 1904 to the 3rd March 1908 the defendant continued to serve in the plaintiffs' firm. Having replied to an advertisement in the papers he secured a post under another firm.

On the 18th February, he gave notice to the plaintiffs that he intended to leave their firm on the 15th March following.

He did not actually join the other firm until the 17th March though he absented himself from the plaintiffs' firm from the 4th March. During the period of that notice at the end of February his pay for February became due, but the plaintiffs stopped his pay to see whether the defendant carried out what he stated to be his intention in his letter of the 18th February.

Considering all the circumstances, I think the plaintiffs were justified in withholding the defendants' pay during the currency of the notice by which the defendant intended to commit a breach of his agreement.

That being so, the suit resolves itself into a question of damages.

Now, what is the measure of damages that the plaintiffs are entitled to ?

The plaintiffs' witness says that it costs about Rs. 550 to bring out a new man from England, that Rs. 100 has to be paid to him on the voyage out and about Rs. 350 for advertisement charges, and the agent's fees have to be paid in England. In the present case no special damages can be made out because the plaintiffs' own case is that immediately the defendant left their firm, they employed one Mr. Gilsilan in his place, though he is not a permanent hand. He is not drawing a bigger salary than the defendant. It is probable that, if the defendant had performed his agreement, the plaintiffs would, at the end of about another year and a half, have had to bring out another man from England to fill the defendant's place.

The plaintiffs are therefore entitled by way of damages to the interest they will lose by having to lay out this sum earlier than they would otherwise have had to have done. I accordingly award to the plaintiffs Rs. 30 as damages for the defendant's breach of his agreement.

I make no order as to the costs of this suit.

There remains only the question of costs of the plaintiffs having obtained an *ex parte* injunction restraining the defendant from joining and working for the firm of Raja Sreenath Roy. The injunction was subsequently discharged, but the costs were reserved. From the facts disclosed, it appears that the plaintiffs were wrong in obtaining the injunction and they must pay to the defendant his costs of having that injunction discharged.

From this judgment, the plaintiff company Burn & Co., Ltd., appealed.

Mr. Buckland for the appellant company. The facts of this case are entirely covered by section 57 of the Specific Relief Act. The Court can import the negative covenant by the respondent, not to take service under any other firm during the period of his agreement, and has power to grant an injunction restraining him from doing so. See *Madras Railway Company v. Thomas Rust* (1). Illustration 4 to section 57 is to the point. See *Callianji Harjivan v. Narsi Tricum* (2)

(1) (1890) L. L. R. 14 Mad. 18.

(2) (1896) L. L. R. 18 Bom. 702, 703.

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and the observations of Farran C. J. on appeal (1). It is true the present tendency of the English Courts is to limit the application of *Lumley v. Wagner* (2), but the Specific Relief Act has adopted the principle and contains the law to be applied in India, and even in England "when the importation of a negative quality into an affirmative agreement is not against the meaning of the agreement, the Court will import the negative quality and restrain the doing of acts inconsistent with the agreement." See Kerr on Injunctions, 4th edition, page 394. See also *Webster v. Dillon* (3), *Montague v. Flockton* (4), *Wolverhampton and Walsall Railway Co. v. London and North-Western Railway Co.* (5) and *DeMatos v. Gibson* (6), which was followed in *Haji Abdul Allarakhi v. Haji Abdul Bacha* (7). The negative covenant, if imported, would not be in restraint of trade within the meaning of section 27 of the Contract Act. See *Charlesworth v. MacDonald* (8) and *The Brahmaputra Tea Co. Ltd. v. Scarth* (9). The jurisdiction to grant an injunction is discretionary with the Court, and on this question the Court will consider the great disadvantage employers of skilled labour are at, in this country, and the great trouble and expense they would be put to, to replace competent employees, who choose to break their contracts of service. In the alternative, if the injunction prayed for be refused, it is submitted the damages awarded by the Court of first instance are inadequate and not "reasonable compensation" within the meaning of section 74 of the Contract Act. See *The Brahmaputra Tea Co. Ltd. v. Scarth* (9).

Mr. Avetoom (*Mr. Stokes* with him) for the respondent. It is conceded that the Court has the power to grant the injunction, but it is submitted that the jurisdiction is discretionary, and that this is not a proper case where an injunction should be granted. The agreement was unfair, one-sided and want-

(1) (1895) I. L. R. 19 Bom. 764, 767.

(2) (1852) 5 De. G. and S. 485.

(3) (1857) 3 Jur. N. S. 432.

(4) (1873) L. R. 16 Eq. 189.

(5) (1873) L. R. 16 Eq. 433.

(6) (1858) 4 De. G. and J. 276.

(7) (1881) I. L. R. 6 Bom. 5.

(8) (1898) I. L. R. 23 Bom. 103.

(9) (1885) I. L. R. 11 Calc. 544,
545, 550.

ing in mutuality. To grant an injunction in a case like the present would amount in substance to a decree for specific performance. See *Callianji Harjivan v. Narsi Tricum* (1). [Maclean C. J. How do you reconcile this with the judgment of Farran C. J. in *Charlesworth v. MacDonald* (2) ?] In the absence of any negative stipulation in the agreement, the company are not entitled to an injunction to restrain their employee from entering the service of another firm. See *Whitwood Chemical Company v. Hardman* (3). An agreement for personal service cannot be enforced otherwise than by an action for damages, though it may possibly be enforced in certain exceptional cases, not to be extended, where there is a strictly negative stipulation. See *Davis v. Foreman* (4).

At the conclusion of the argument it was mentioned by Counsel that the respondent was now willing to return to the service of the appellant company, and the latter were willing to take him back.

* MACLEAN C. J. The plaintiffs in this case are a firm of Engineers in the neighbourhood of Calcutta, and the defendant entered into a contract with them to act as a draughtsman and general assistant in their business at Howrah. That agreement was reduced into writing. It is dated the 27th of July 1904, and was made in England; the defendant was then in England, and he came out here, the plaintiffs paying the expenses of his passage out. By that agreement he covenanted that on his arrival at Calcutta he should "at once report himself at the said Engineering Works at Howrah aforesaid and enter upon his duties aforesaid and during the said period of this agreement he should diligently and to the best of his ability devote himself to the duties incumbent on him as aforesaid and should faithfully observe and comply with such instructions as he might from time to time receive from the said Messrs. Burn & Co., Ltd., or their authorised representative

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(1) (1895) I. L. R. 19 Bom. 754, 763.

(3) [1891, A. C. 416.

(2) (1898) I. L. R. 23 Bom. 103, 112,
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(4) [1894, 3 Ch. 654, 657.

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for the time being." There are other provisions in the contract, namely, as to the conditions upon which the defendant might be dismissed by Messrs. Burn & Co., but they are not material. In the 12th paragraph both parties "bound and obliged themselves to perform their respective parts of the premises to each other under the penalty of one hundred pounds to be paid by the party failing to the party performing or willing to perform over and above performance." In accordance with the terms of that agreement, the defendant came out from England and entered upon his duties as an assistant with Burn & Co. and he seems to have discharged those duties very satisfactorily, I find nothing to the contrary, for some three and a half years. But on the 18th of February 1908, he wrote to his employers a letter, the effect of which was that he proposed to resign and leave that employment on the 15th of March next. To that Messrs. Burn and Co. replied that "they declined to accept the resignation and gave him notice that they would take legal steps to enforce the terms of his agreement with them." We need not refer further to the correspondence in detail. It is sufficient to say that early in March, on the pretext that the plaintiffs had refused to pay him his February salary, the defendant left the firm's service and took employment with the firm of Raja Sreenath Roy and Brothers. The plaintiffs then instituted this suit, and asked for damages and "for an injunction to restrain the defendant from serving, working or being employed by the said Raja Sreenath Roy and Brothers or any person or persons other than the plaintiff company." I ought to have said that the agreement was to last for five years, which expired on the 13th of October 1909.

The matter was tried before Mr. Justice Fletcher, and he refused to grant an injunction; he gave the plaintiffs Rs. 30 by way of damages and no costs of the suit. In fact he ordered the plaintiffs to pay the costs of an application for an interlocutory injunction. The plaintiffs have appealed.

There is no dispute as to the facts; and I will deal as shortly as I can with the legal points which have been raised. It is suggested that in a case of this sort, the Court ought not to

grant an injunction, that the question of granting or refusing an injunction is one which lies in the exercise of the judicial discretion of the Court, and that in a case such as the present it ought not to be granted. We have been referred to the law in England on the subject. The law of England no doubt is that a mandatory injunction will not be granted for the specific performance of a personal service—but ever since the day of *Lumley v. Wagner* (1), which is a decision now some 50 to 60 years old, it has been laid down that, although the Court cannot grant a mandatory injunction to that effect, yet where in the agreement there is a negative clause, that is to say, a clause to the effect that the contracting party will not serve anybody else, effect can be given to that and an injunction granted. In the present contract there is no such negative condition in terms. But, although I do not think that authorities in England are very useful to us, in dealing with questions codified by the law of India, I should like to call attention to the observations of Lord Selborne, then Lord Chancellor sitting as Master of the Rolls in the case of *Wolverhampton and Walsall Railway Co. v. London and North-Western Railway Company* (2). The passage I propose to read is at page 440. This is what this great Judge says:—"With regard to the case of *Lumley v. Wagner* (1), to which reference was made, really when it comes to be examined, it is not a case which tends in any way to limit the ordinary jurisdiction of this Court to do justice between parties by way of injunction. It was sought in that case to enlarge the jurisdiction on a highly artificial and technical ground and to extend it to an ordinary case of hiring and service, which is not properly a case of specific performance, the technical distinction being made, that if you find the word "not" in an agreement "I will not do a thing" as well as the words "I will," even although the negative term might have been implied from the positive, yet the Court, refusing to act on an implication of the negative will act on the expression of it. I can only say, that I should think it was the safer and the better rule, if it should eventually be adopted by this Court, to look

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(1) (1852) 5 De. G. & S. 485.

(2) (1873) L. R. 16 Eq. 433, 440.

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in all such cases to the substance and not to the form. If the substance of the agreement is such that it would be violated by doing the thing sought to be prevented, then the question will arise, whether this is the Court to come to for a remedy. If it is, I cannot think that ought to depend on the use of the negative rather than an affirmative form of expression. If, on the other hand, the substance of the thing is such that the remedy ought to be sought elsewhere, then I do not think that the form ought to be changed by the use of a negative rather than an affirmative."

If it had been necessary I should have applied that principle to the present case, but here we have to deal with the law in India. The law in India on this subject is codified and, it has been laid down in the House of Lords, by the Judicial Committee and in several cases in this Court, to some of which I myself was a party, that where the law has been codified it is of little avail to enquire what is the law apart from such codification, but we must look to the Code itself as our guide in the matter. The law here is codified by section 57 of the Specific Relief Act. That seems to me to make the case reasonably clear. That section runs as follows :—"Notwithstanding section 56, clause (f)" — clause (f) says that an injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced—"Where a contract comprises an affirmative agreement to do a certain act coupled with a negative agreement, express or implied, not to do a certain act, the circumstance that the Court is unable to compel specific performance of the affirmative agreement, shall not preclude it from granting an injunction to perform the negative agreement; provided that the applicant has not failed to perform the contract so far as it is binding on him." The language of that section is reasonably clear, and it appears to give legislative sanction in India to the view expressed by Lord Selborne in the passage I have read. If there had been any doubt as to the meaning of the language of the section, illustration (d) is conclusive upon the subject. It runs :—"B contracts with A that he will serve him faithfully

for twelve months as a clerk. A is not entitled to a decree for specific performance of this contract. But he is entitled to an injunction restraining B from serving a rival house as clerk." The view I entertain coincides with that of the late Chief Justice Farran in the case of *Charlesworth v. MacDonald* (1). In that case the Court thought that there was a negative covenant, although the terms of the agreement were not very clear. After dealing with the case of *Lumley v. Wagner* (2) Farran C. J. says: "In my opinion it would be most unfair to gentlemen in the position of the plaintiff not to protect them in such cases. It would virtually debar them from engaging an assistant at all. An action for damages would afford them no protection, certainly no adequate protection;" and, in a previous part of his judgment he refers to section 57 of the Specific Relief Act and speaks of it "as a legislative decision to the same effect." Now, can we in the present case properly say that a negative covenant is implied?

I feel no doubt about it. Here the covenant is that the defendant will diligently and to the best of his ability devote himself to the duties as a draftsman and general assistant. Surely when a man says that he will devote himself during a period of years to the business of a particular firm, it does imply that he will not give his services during that period to any other firm. It would be dangerous to hold the contrary. Here to my mind, an injunction is not only the most effective but the only remedy according to the principles of equity, justice and good conscience. To give damages in a case of this sort—damages, which perhaps will never be recovered—will be a very small consolation to the plaintiffs. It is said that if we grant an injunction the defendant will starve. We have nothing to do with that; he ought to have thought of that, before he deliberately broke his contract;—as a matter of fact there is no vista in that direction as the defendant is willing to go back and the appellants are willing to take him back into their service. It is important in this country that

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(1) (1898) I. L. R. 23 Bom. 103, 113. (2) (1852) 5 De. G. & S. 485.

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assistants should know when they enter into contracts of this nature, when they are brought out to India at considerable expenso by their employers, that they cannot treat their employers in this high-handed fashion. They must honestly and faithfully perform their contracts. If the defendant's argument was well-founded he might have left Burn & Co., at the end of a week instead of at the end of three years. Here we have a case in which the contract is deliberately entered into and most deliberately broken. In my opinion, the plaintiffs are entitled to that special remedy, which the principles of equity, justice and good conscience demand, of an injunction to prevent the defendant from breaking his contract. There is no suggestion in the pleadings—there is not one word in the evidence, that Burn & Co. have not treated him properly. In fact they are willing to take him back.

It is not necessary, as we are asked for and are granting an injunction, to go into the question of damages; but I do not desire to be understood as agreeing with the principle upon which the Court of first instance has given Rs. 30 as damages. I can scarcely think that the learned Judge would have done this, had his attention been attracted to section 74 of the Indian Contract Act.

The result, therefore, is that the decision of Fletcher J. is reversed and that a decree must be made for an injunction in terms of the prayer and that the defendant must pay the costs of the suit and the appeal, including those of the interlocutory injunction.

HARINGTON J. I agree: but, inasmuch as we are differing from the learned Judge in the Court of first instance, I propose to add a few words.

The agreement between the plaintiffs and the defendant was that the plaintiffs should employ the defendant for a period of five years and that the defendant should serve the plaintiffs during that period, and there was a stipulation that, if either the plaintiffs failed to perform their part of the agreement

or the defendant failed to perform his part, a sum of £100 should be payable by the party in default to the one who was ready to carry out the agreement. Now, while the defendant was employed under that contract of service he appears to have seen an advertisement, which attracted him, he desired therefore to quit the services of the plaintiffs. It appears that he first spoke to the plaintiffs' manager about his desire to leave and the result of that conversation was a letter declining to forego, on behalf of the firm, any part of the agreement and pointing out to the defendant that, if he desired to quit the services of the firm, he could do so, at a month's notice, on paying the amount stipulated in the agreement. In reply to that the defendant wrote declining to pay the sum of money stipulated under the agreement, because, he said, he was not in a position to do so and asking the firm to accept his resignation. That the firm declined to do and subsequently, against the wishes of the plaintiffs, the defendant quitted their services and thereby broke the agreement, which he had entered into with them. Now, the plaintiffs ask for an injunction to prevent the defendant from entering into the service of a rival firm and giving them the advantages of his skill.

It is said that no injunction ought to be granted on two substantial grounds. One is that the agreement contained no negative stipulation under which the defendant undertook not to serve any rival firm of Engineers; and secondly on the ground that the granting of an injunction is an indirect means of enforcing a covenant, of which the specific performance would not be granted, that is to say, a covenant to perform a personal service.

Now, no doubt, these two grounds influenced the learned Lord Justices in England, who decided the case of *Whitwood Chemical Co. v. Hardman* (1): and they were further influenced by the danger, which they considered there was, in a country like England, of extending the case of *Lumley v. Wagner* (2). The case of *Whitwood Chemical Co. v. Hardman* (1)

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(1) [1891] 1 Ch. 413.

(2) [1852] 5 D. & G. 483.

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was afterwards followed by Mr. Justice Romer in the later case of *Ehrman v. Bartholomew* (1), in which, in refusing an injunction, the learned Judge adopted and assented to the observations of the Lord Justices in *Whitwood Chemical Co. v. Hardman* (2) as to the danger of extending the case of *Lumley v. Wagner* (3). So if those cases represented what was the law here, there might be, at any rate, a good deal to be said on behalf of the respondent. But the answer is that the law here is expressed in section 57 of the Specific Relief Act, which provides that an injunction may be granted for a negative agreement, either express or implied, notwithstanding the fact that the specific performance of the positive agreement cannot be enforced under the law. So, that disposes at once of one of the grounds on which the respondent must rely.

Then, with regard to the other ground, that it is an indirect way of enforcing a covenant for personal service, that is met by illustration (d) to section 57: that gives an instance of a case in which the plaintiffs would be entitled to an injunction—a case which is on all fours with the present case. The result is that section 57 as illustrated by illustration (d) shows that the two grounds, which have been relied upon by the respondent, do not represent what is the law in this country, and I therefore think that there are no grounds for refusing an injunction in the present case.

Then, as regards another point, the learned Judge in his judgment expressed the opinion that, if it had been necessary to decide, he should have held that this agreement was void as being an agreement in restraint of trade. (4) With very great deference to the learned Judge, speaking for myself I should have thought that an agreement to serve Messrs. Burn & Co. in the course of their trade was not an agreement in restraint of trade, because by it the defendant stipulated that he would ply his trade, and that distinguishes the case

(1) [1899] 1 Ch. 671.

(2) [1891] 1 Ch. 416.

(3) [1852] 5 De. G. & E. 485.

(4) See p. 316.

from that familiar class of cases in which an employee covenants that after the expiration of his service he will not ply his trade within some specified distance of his late employer's place of business. In the one case, he agrees to ply his trade, in the other case he specifically agrees not to ply his trade. But, whether that distinction be sound or not, it is really not necessary in the present case, because, in my opinion, illustration (d) affords the answer to the argument that this contract is void as in restraint of trade. Illustration (d), as I pointed out, deals with a case which is on all fours with the present and says that the plaintiffs are entitled in such a case to an injunction. Under those circumstances, it cannot be said that a similar stipulation in this case is void, being in restraint of trade. If so, illustration (d) would provide that an injunction could not be granted, because the agreement was void. In my opinion, illustration (d) to section 57 meets the point as to the contract being void as being in restraint of trade and that disposes of that point in favour of the plaintiffs. For these reasons I agree that this appeal should be allowed.

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BRETT J. I agree with the learned Chief Justice and have nothing to add.

Appeal allowed.

Attorneys for the appellant Company : *Orr, Dignam & Co.*

Attorneys for the respondent : *Leslie & Hinds.*

J. C.

CRIMINAL REVISION.

Before Mr. Justice Sharfuddin and Mr. Justice Cox.

1908
December 12.

KISHORI LAL ROY

v.

SRINATH ROY.*

Criminal Procedure Code (Act V of 1898), ss. 145, 192(2) and 529 (f)—Dispute concerning land—Jurisdiction of Magistrate—Pendency of a civil suit concerning the disputed land—Subsistence of prohibitory order on the part of the Magistrate—Transfer of case without jurisdiction—Likelihood of breach of the peace.

The pendency of a suit under section 9 of the Specific Relief Act (I of 1892) with regard to certain land in dispute does not oust the Magistrate's jurisdiction to take proceedings under section 145 of the Criminal Procedure Code in respect of the same land, if he finds reasonable grounds for apprehending breach of the peace.

The fact that on the date of the institution of the proceedings under section 145 of the Code there was a subsisting order under section 144, the terms of which were not before the Court, passed against the landlords in a proceeding to which the tenants, through whom they claimed to be in possession, were not parties, does not justify the Court in setting aside the proceedings under section 145, in respect of the same subject matter of dispute, as with jurisdiction.

A transfer by a first class Magistrate of a case under section 145 erroneous and in good faith does not vitiate the proceedings by reason of the provision of section 529 (f).

Alkar Ali Khan v. Domi Lal (1) followed

Section 145 requires that the Magistrate, before instituting proceedings thereunder, must be satisfied, on the materials before him, that there is likelihood of a breach of the peace with regard to some immovable property between the parties.

Where the Magistrate initiated proceedings under section 145 on a police report on which he was satisfied that there was an apprehension of a breach of the peace, and there was evidence on the record of a probability of such breach of the peace, the High Court refused to set aside the final order as without jurisdiction.

* Criminal Revision No. 1092 of 1908, against the order of G. C. Banerjee, Deputy Magistrate of Dacca, dated the 28th August 1908.

(1) (1900) 4 C. W. N. 821.

CRIMINAL RULE.

UPON the receipt of a police report, dated the 25th February 1908, stating that there was a likelihood of a breach of the peace between Srinath Roy, the first party, and the petitioners, regarding the possession of certain *chur* land, a Deputy Magistrate of Dacca issued a prohibitory order under section 144 of the Code, on the 28th February, on both parties. Thereafter upon a fresh police report of the 12th April, F. Husain, a Deputy Magistrate of the first class, initiated proceedings, on the 23rd instant, under section 145 in respect of the same land against the parties calling upon them to file written statements of their respective claims as regards the fact of actual possession of the subject of dispute, and ultimately transferred the case for disposal to G. C. Banerjee, another first class Deputy Magistrate, who added certain other persons, as third party, and directed them also to file written statements and produce evidence. The first and third parties claimed to be in possession of the *chur* through their tenants, while the second party claimed to be in sole possession also through their tenants.

It appeared that on the 8th February, 1908, a suit under section 9 of the Specific Relief Act was instituted for the recovery of possession of the same *chur*, which was pending at the time of the present proceedings. The second party urged before the Magistrate that his jurisdiction was ousted by the suit, but the objection was overruled, and he declared the first and third parties to be entitled to possession by his order, dated the 28th August, passed after taking evidence in the case.

Mr. Garth and Babu Surendra Nath Ghosal for the petitioners.

Mr. Dunne and Babu Baikanta Nath Das for the first party.

Mr. P. L. Roy and Babu Harendra Narain Mitter for the third party.

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peace with regard to some immoveable property between the parties. We find that the Magistrate initiated these proceedings on a report on which he was satisfied that there was an apprehension of a breach of the peace. We also find from the explanation of the Magistrate that there is evidence on the record that there was a probability of a breach of the peace. On these findings we cannot say that the Magistrate acted without jurisdiction.

Under these circumstances, we think that all the grounds taken by the second party fail.

In conclusion we may observe that in issuing this Rule we did not attach any importance to the allegations made in the third paragraph of the petition. The Rule was granted on other grounds. The result is that the Rule is discharged.

Rule discharged.

CRIMINAL REVISION.

Before Mr. Justice Holmwood and Mr. Justice Ryves.

UPENDRA NATH BAGCHI

v.

EMPEROR.*

1909

January 28.

Defamation—Pleader—Improper questions in cross-examination based on wrong inference from defective memory—Privilege—Good faith—Absence of express malice—Penal Code (Act XLV of 1860), ss. 52 and 499, Exception (9).

A pleader acting upon his own recollection of the evidence given by a witness two years before, in another case in which he was a pleader, but drawing a wrong inference therefrom that the witness had been disbelieved by a particular Court, and had admitted to having been so disbelieved, and putting questions to him conveying such an imputation, after being warned that his impression was wrong, cannot, in the absence of actual malice, be convicted of defamation.

A pleader, especially in the mofussil, where instructions are very commonly inaccurate and misleading, is as much justified in acting on his own recollection as on specific instructions, and the fact that he has drawn a wrong inference does not, in the absence of actual malice, deprive him of the protection of the ninth Exception to section 499 of the Penal Code.

When a pleader is charged with defamation, in respect of words spoken or written, while performing his duty as a pleader, the Court ought to presume good faith, and not hold him criminally liable, unless there is satisfactory evidence of actual malice and unless there is cogent proof that unfair advantage was taken of his position as a pleader for an indirect purpose.

In re Nagarkhi Trikamji (1) and *Emperor v. Purshottamdas Ranchhoddas* (2) followed.

CRIMINAL RULE.

THE petitioner, a pleader of the Bhagulpur bar, was tried by the District Magistrate of Bhagulpur and convicted, on the 13th July 1908, under section 500 of the Penal Code and sentenced to a fine of Rs. 150.

On appeal the conviction and sentence were affirmed by the Sessions Judge on the 23rd September.

* Criminal Revision No. 1267 of 1908, against the order of J. C. Twidell, Sessions Judge of Bhagulpur, dated 23rd September 1908.

(1) (1894) L. L. R. 19 Bom. 340.

(2) (1907) 9 Bom. L. R. 1287.

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" "
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The District Magistrate found that there was no evidence of express malice or personal *animus* on his part, but the Judge came to no finding on the point, holding it to be unnecessary to determine it.

It appeared that in May 1908 certain proceedings under section 147 of the Criminal Procedure Code, between the Bancli Raj and the Durbhanga Raj, were pending before Karim Hossein, a Deputy Magistrate, and during the course of them Mr. Savi, the Assistant Manager of the Bancli Raj, was examined as a witness for his party. The accused, who was conducting the case for the opposite party, asked Mr. Savi the following question in cross-examination :—

Were you disbelieved by the Sessions Judge of Bhagulpur in Biranchi Singh's case ?

The pleaders on the other side objected to the question on the ground that it was based on an assumption of fact which, to their personal knowledge, was not true, and further that it was irrelevant. But the accused persisted in putting the question, alleging his own knowledge of the matter. The Court relying on this assertion admitted it, and it was answered by the witness in the negative. The accused then put the following question.

Did you not state before Mr. Hamilton in Lal Behary Singh's case that you were disbelieved by the Sessions Judge, but were believed by the High Court ?

A similar objection was taken to the question as on the first occasion, but it was allowed on the statement of the accused that he was himself a pleader in Lal Behary Singh's case for the defence and had heard Mr. Savi make the admission. This question was also answered by the witness in the negative.

On the next day Mr. Savi filed a complaint against the petitioner, under sections 500 and 504 of the Penal Code, in respect of these two questions, before the District Magistrate, and the accused filed a written statement thereafter admitting that the imputation conveyed in these questions was without any foundation, but putting forward the plea of good faith.

It further appeared that in September 1905 one Biranchi Singh, who was tried with others for dacoity in the Sessions Court of Bhagulpur, had set up an *alibi* and examined Mr. Savi in support of it. The accused was not personally connected with, or present at, the hearing of this case. The Sessions Judge, while finding no reason to doubt Mr. Savi's evidence, held that it was insufficient to establish the *alibi* and convicted Biranchi. On his appeal the High Court, accepting Mr. Savi's evidence, considered the *alibi* made out and acquitted him.

On 1st May 1906, one Lal Behary Singh was tried for rioting before the Sessions Judge of Bhagulpur, and Mr. Savi was examined to prove an *alibi* for him. The accused appeared as a pleader in the case for the accused. Syamal Das Chuckerbutty, the Government pleader, who was conducting the prosecution, asked Mr. Savi a question in regard to his evidence in Biranchi's case, which was not recorded, but the answer was: "we had a servant, Biranchi Singh, who was charged with dacoity. I gave evidence for him. He was acquitted by the High Court." The Government pleader deposed in the present case that when he put his question to Mr. Savi he wanted to show most probably that his evidence was not believed by the Sessions Judge. The petitioner asked the witness no question in re-examination in the case to clear up the point.

The Advocate-General, Mr. Sinha (Mr. P. L. Roy and Babu Sailendranath Palit with him), for the opposite party. The questions put were absolutely without foundation as Mr. Savi had not been disbelieved by the Sessions Judge in Biranchi's case. Notwithstanding that the accused was warned that the imputation was not true, he persisted in putting the questions. The privileges of the bar, while being protected, should not be abused. Did the accused act "with due care and caution" within section 52 of the Penal Code. As he took upon himself the responsibility of asking the questions on his own knowledge he must bear the consequences, if he turned out to be wrong. The question of privilege must be governed by the Penal Code

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itself and not by English law: see *Norendra Nath Sircar v. Kamalbasini Dasi* (1).

Mr. Dunne (Mr. K. N. Chowdhry, Babu Dasarathy Sanyal, Babu Ganendranath Sarkar and Babu Suresh Chunder Mookerjee with him), for the petitioner. The questions are not in themselves defamatory, though they may have been improper. The accused said he had knowledge of the matter. He found afterwards that the suggestion he meant to convey was incorrect, and he filed a written statement that he honestly believed at the time that he was justified in putting the questions. A man honestly believing the impression on his mind to be correct and acting on it does so in good faith. No malice is found in this case. His memory was only at fault. The position of an advocate is different from that of an ordinary person. The prosecution must prove in his case that he had not an honest belief. Refers to Sullivan v. Norton (2), In re Nagarkhi Trikamji (3) and Isuri Prasad Singh v. Umrao Singh (4). If a pleader acting on instructions is protected as having acted in good faith, the fact that he acted on his recollection cannot put him on a lower footing as to the question of his good faith. If he is justified in putting questions based on the memory of other persons, as he would be in the case of instructions, he cannot be prosecuted for relying on his own memory. The records of the cases of Biranchi and Lal Behary were not at the time in Court. The Court ought, where a pleader is concerned, to presume good faith, unless there is satisfactory evidence of actual malice: Emperor v. Purshottamdas Ranchhoddas (5).

HOLMWOOD AND RYVES JJ. Babu Upendra Nath Bagchi, a vakil of the High Court and one of the leading pleaders of the Bhagulpur Bar, was convicted by the learned District Magistrate under section 500 of the Indian Penal Code and ordered

(1) (1896) I. L. R. 23 Calc. 563.

(3) (1894) I. L. R. 19 Bom. 340.

(2) (1886) I. L. R. 10 Mad. 28.

(4) (1900) I. L. R. 22 All. 234

(5) (1907) 9 Bom. L. R. 1287.

to pay a fine of Rs. 150. The conviction and sentence were upheld on appeal by the learned Sessions Judge.

The circumstances of the case are peculiar and raise a question of very great importance. The facts of the case are practically admitted. Mr. F. A. Savi, who is the Assistant Manager of the Banali Raj, was called as a witness in a case under section 147 of the Criminal Procedure Code, which was being contested between the Banali Raj and the Durbhanga Raj. The appellant, who appeared as a pleader on behalf of the Durbhanga Raj, cross-examined Mr. Savi and, with the object of impeaching his credit, asked him whether the Sessions Judge had disbelieved his evidence in the case of Biranchi Singh. It appears that when the appellant put this question, the pleaders on the side of the Banali Raj objected to it as being improper, and the Court itself only allowed the question to be put on the appellant's assertion that he knew of his own knowledge that such was the case, and that the next question that he would put would prove it. The question was then put and was answered in the negative by Mr. Savi. The next question that was put to him (and also negatived) was "Did you not state before Mr. Hamilton in Lal Behary Singh's case that you were disbelieved by the Sessions Judge, but were believed by the High Court?" To this question also objection was taken, and it was allowed to be put by the Court only on the assurance of the pleader that it was correct. The fact that this second question was pressed, has been held by the lower Courts as aggravating the offence, but it seems to us that, if he had not put it, that fact would have been some evidence against his *bona fides*. These two questions form the subject matter of the charge of defamation, of which the accused has been convicted.

In order to understand the case it is necessary to set out some further facts. Some time in September 1905 one Biranchi Singh, amongst others, was tried on a charge of dacoity before the Sessions Judge of Bhagulpur. His defence was an *alibi* and, in support of it, he called and examined Mr. Savi as a

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witness. The Court of Sessions, however, convicted Biranchi Singh holding as a matter of fact that, although there was no reason to doubt Mr. Savi's evidence, yet that evidence did not establish the *alibi*. On appeal this Court held that Mr. Savi's evidence, which had been believed by the Sessions Judge and also by this Court, did establish the *alibi*, and acquitted Biranchi Singh. The appellant, Upendra Nath Bagchi, had nothing to do with that case and apparently was entirely ignorant of what had happened in that case. This is an important feature to bear in mind.

On the 1st of May 1906, one Lal Behary Singh was tried for rioting by Mr. Hamilton, the then Sessions Judge of Bhagulpur, and in that case also Mr. Savi was called as a witness for the defence and deposed to an *alibi* set up by the accused. In this case the appellant appeared as the pleader for the accused, so that Mr. Savi was his own witness. The Government pleader in cross-examining Mr. Savi put certain questions to him, obviously with the intention of shaking his credit. The Government pleader has been examined in this case and so also has Mr. Savi, but, after the lapse of over two years, it is not unnatural that neither of them can recollect the exact form of the questions. But from the way in which the answers have been recorded, we do not think there can be much substantial doubt as to what the question or questions were. The record runs "we had a servant, Biranchi Singh, who was charged with dacoity. I gave evidence for him. He was acquitted by the High Court." We think the Government pleader probably asked him whether the Sessions Judge disbelieved the *alibi* set up by Biranchi Singh in that case, which *alibi* was supported by Mr. Savi's evidence. What the Government pleader himself says is "when I put the question to Mr. Savi, in regard to which his statement is recorded, I wanted to show, most probably, that his evidence was not believed by the Sessions Judge." Now how came the Government pleader to put this question? He is a very experienced practitioner, and has been Government pleader for over 13 years. He admits that

he had not read the Sessions Judge's judgment in Biranchi Singh's case, and he also admits that, if he had read it, he could not have put the question, and this is obvious, because he would then have realized that the question would have been as useless as it was improper. He did, however, put the question. We do not think he had instructions to put the question. He says "I myself knew of the case of Biranchi Singh and needed very little instruction." As he had not read the judgment of the Sessions Judge his personal knowledge or recollection can only have amounted to this, namely, that Mr. Savi had sworn in support of Biranchi Singh's *alibi*, and that, in spite of this, the Sessions Judge convicted Biranchi Singh. Is it not very likely that, putting these two circumstances together, the Government pleader himself fell into a similar error as the appellant, and drew the wrong inference that the Sessions Judge had disbelieved Mr. Savi, and was thereby induced to cross-examine Mr. Savi on the point? Mr. Savi's answer appears at the very end of a rather long cross-examination, and we think that, if the appellant, who is described as an experienced and acute pleader, had known the real facts of Biranchi Singh's case, he would certainly in re-examination have cleared up the matter by asking Mr. Savi (his own witness) if he had not, as a matter of fact, been believed even by the Sessions Judge. On the other hand if, as a matter of fact, as it appears, he knew nothing beforehand of Biranchi Singh's case, it is possible that the inference, which the appellant drew at the time from the way in which the answer is recorded, was that Mr. Savi admitted, or at least left it open to implication, that as a fact he had been disbelieved by the Sessions Judge, but that his veracity had been established by the High Court. If this was the inference, which he drew at the time, he might well have thought it quite unnecessary to re-examine him on the point, thinking that it was enough that the High Court had believed his witness.

In the petition of complaint in this case it is stated that the appellant put the questions intending to harm and injure

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the complainant's reputation, and that the complainant had reason to believe that the appellant was dissatisfied and annoyed with the master of the Hanchi Haj and with the complainant, and put the questions maliciously knowing that he was making a false and untrue allegation and insinuation in order to satisfy his personal grudge. In the course of his exhaustive and very able judgment the learned District Magistrate, Mr. Lyall, has distinctly found that there is no evidence to prove express malice on the part of the accused nor any reason to believe that he had any personal motive or animus against Mr. Savi. He goes on to say, however, quoting from Collet, that malice is of two kinds, malice in law and malice in fact: malice in law is where a wrongful act (e.g., the defamation of another) is done without just cause or excuse. He then goes on to consider whether the appellant, when he put the questions, had just cause or excuse. He finds that he was not instructed to put the questions, and he also finds that he had no right to rely implicitly on his recollection of what Mr. Savi had said in Lal Behary Singh's case and, in short, that in any case he should certainly not have drawn the inference which, he says, he drew, because it was not the only or true inference which he could have drawn, and that, therefore, he acted without just cause or excuse.

The learned Sessions Judge has come to no finding on the question of express malice, holding that it was unnecessary to decide the point. To us it seems a matter of very great importance, and we have no hesitation in coming to the conclusion arrived at by Mr. Lyall. We do not think that the appellant had the slightest personal motive in the matter. We believe that he was acting entirely in the interests of his client, and the only question, which we have to decide, is whether, on the facts of this case, the appellant is or is not protected by the ninth Exception to section 499. We are entirely of opinion that he is. The learned District Magistrate seems to be of opinion that the appellant should not have put the first question merely relying on his memory without first perusing the

records of the case to verify his recollection, and, more especially, should not have relied on his memory when the pleaders on the other side warned him that he was mistaken. But the records of the case were not in the Court, and we certainly do not think that the Court would or should have adjourned the taking of the further evidence of Mr. Savi to enable the appellant to examine a record deposited in some other Court. It seems to us that it would be very dangerous to tie the hands of Counsel in this way. We find on examination that, in fact, the appellant's memory of the incident was substantially accurate. The mistake he made was in the inference he drew from what he remembered to be Mr. Savi's answer. But this inference was a possible one, although not, of course, the necessary inference to be drawn, and we think that, if the accused, rightly or wrongly, did draw this inference, he was bound, in the interests of his client, to rely on his own recollection. It seems to us, especially in the metropolis of this country, where instructions, to the personal knowledge of one of us, are very commonly inaccurate and misleading, that a pleader would certainly be at least as much justified in acting on his own recollection as on specific instructions, and we do not think that, because he has drawn merely a wrong inference from a fact, that of itself, in the absence of any malice, should take him out of the ninth Exception to section 499. We agree with the remarks of Jardine and Farran JJ. in *In re Nagarji Trikamji* (1), which were recently referred to with approval by Chandavarkar and Knight JJ. in *Emperor v. Purshottamdas Ranchhoddas* (2), namely, "when a pleader is charged with defamation in respect of words spoken or written, while performing his duty as a pleader, the Court ought to presume good faith and not hold him criminally liable, unless there is satisfactory evidence of actual malice and unless there is cogent proof that unfair advantage was taken of his position as pleader for an indirect purpose." In this case, as we have pointed out, there is no evidence of any express malice, and the

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(1) (1894) I. L. R. 19 Bom. 340

(2) (1907) 9 Bom. L. R. 1257.

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 EUREKA.

alleged unfair advantage taken of his position, without due care and attention, turns out to be at most a very natural, though, as it happens, a wrong inference evidently made at the time Mr. Savi was examined in Lal Behary's case, and used in apparent good faith in the later case, entirely in the interest of his client and not for his own ends.

For these reasons we make the Rule absolute, and direct that the conviction be set aside and the fine, if paid, refunded.

Rule absolute.

T. R. M.

CRIMINAL REVISION.

Before Mr. Justice Holmwood and Mr. Justice Ryves.

RAMTOHAL DUSADH

v.

EMPEROR.*

1909

January 14

Appeal, admission of—Hearing on date of filing—Pleader—Right to be heard—Practice in the mofussil—Criminal Procedure Code (Act V of 1893), s. 421.

A pleader for an appellant should not be called upon, immediately on the filing of an appeal, to support it, but should be afforded a reasonable opportunity of being heard.

If the appeal is not admitted at once, and the Court desires to hear the appellant, before admitting it under section 421 of the Criminal Procedure Code, he should be given the same notice, as is given to the Crown.

Semle, the practice in the mofussil is to admit appeals, which [are supported by pleaders, without any hearing, except on a question of bail; the only cases, which are dealt with under section 421 of the Code, being jail appeals.

CRIMINAL RULE.

THE accused was tried and sentenced, on the 3rd November 1908, to nine months' rigorous imprisonment, for theft of the complainant's cattle, by the Sub-divisional Magistrate of Dinapore. He appealed to the Sessions Judge of Patna, who called upon the pleader, who presented the appeal, to argue it on the same day. The pleader was not prepared to do so, and the appeal was summarily rejected under section 421 of the Code without his being heard.

The accused then obtained the present Rule to set aside the order of the Judge on the ground that his pleader had not been given a reasonable opportunity of being heard.

Mr. Dunne (Babu Gonesh Dutt Singh with him) for the petitioner. The Judge called upon the pleader for the appellant to proceed with the case on the date on which the petition of appeal was presented for admission. He had no reasonable

* Criminal Revision No. 1303 of 1908, against the order of F. M. Lucas, Sub-divisional Magistrate of Dinapore, dated the 3rd November 1908.

or all of the grounds upon which it was laid. We do not think that this is a reasonable opportunity of being heard. Had it been necessary to call upon the Crown, according to the universal practice, the Crown would have had a week's notice, and we think the appellants should also have the same notice, if the Court desires to hear them under section 421 before admitting the appeal.

We, therefore, make the Rule absolute, and direct that the pleader should have a further opportunity of being heard after due notice to the appellants.

Rule absolute.

R. H. M.

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DUSADH
v.
EMPEROR.

ORIGINAL CIVIL.

Before Mr. Justice Fletcher.

1909

CHOONI LAL

v.

MADHORAM AND OTHERS.*

December 17.

Arbitration—Bengal Chamber of Commerce, arbitration by—Rules—Umpire, appointment of—Effect of failure to appoint.

The rules relating to arbitration under the Bengal Chamber of Commerce contemplate the appointment of an Umpire before the Arbitrators enter upon the reference, and not upon a disagreement between them.

Where the terms of a reference provide for the appointment of an Umpire before the arbitrators enter upon the reference, until the Umpire is appointed, the reference cannot proceed.

Bright v. Durnell (1), *Dates v. Townley* (2) followed.

MOTION.

THIS was an application made by the petitioner Chooni Lal under section 11, sub-section (2) of the Indian Arbitration Act for an order that an award made by the Bengal Chamber of Commerce be filed and a decree made thereon. The motion came on for hearing on the 11th November 1908, and the respondent in opposing the application relied on the case of *Hurdwary Mull v. Ahmed Musaji Selaji* (3), and judgment was reserved.

Thereafter, on the 25th November, under the direction of the Court the matter was further argued upon the question of the appointment of an Umpire.

Mr. O. C. Ghose for the applicant Chooni Lal. The rules of the Bengal Chamber of Commerce contemplate the appointment of an Umpire only when the Arbitrators disagree. This is clearly shown by reference to Rule VI. In this case, however, the Arbitrators have not disagreed at all and therefore the question of appointing an Umpire does not arise.

* Original Civil Suit No. 668 of 1908.

(1) (1836) 4 Dow. 756.

(2) (1847) 1 Ex. 572.

(3) (1903) 13 C. W. N. 63.

Mr. P. L. Buckland for the respondent. The appointment of an Umpire by the Registrar is a condition precedent to the Arbitrators entering on a reference, and until such appointment is made the tribunal to be constituted under the Rules of the Chamber for determining the dispute cannot be properly constituted.

The words in Rule VI show that not only must the Arbitrators and Umpire be appointed on receipt of an application, but their consent must be obtained before the arbitration is conducted. The proceedings in this case have all along been irregular and the contention raised by the other side is fully met by the following English cases. *Bright v. Durnell* (1) and *Bates v. Townley* (2).

Cur. adv. vult.

FLETCHER J. This is an application by the petitioner for an order that an award made by the Bengal Chamber of Commerce may be filed in Court and that a decree be passed thereon for judgment in accordance with the terms of the award. Upon the matter first coming on before me the application was opposed by the respondents on the same grounds as those raised in *Hurdvary's case* (3) with this important exception that it was not suggested in this case that the Arbitrators had allowed the time for making the award to expire before making their award.

In these circumstances I had to consider whether I ought not to remit this case to the Arbitrators.

On a more careful study of the Arbitration Rules of the Chamber of Commerce, however, it occurred to me that it was open to doubt whether the arbitral tribunal contemplated by the Rules of the Chamber of Commerce had ever been duly constituted on the ground that the Registrar had failed to appoint an Umpire. Accordingly, I set this matter down to be re-argued.

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CHOONI LAL
v.
MADHORAN.
FLETCHER J.

(1) (1836) 4 Dow. 755.

(2) (1847) 1 Ex. 572.

(3) (1908) 13 C. W. N. 63.

ORIGINAL CIVIL.

Before Mr. Justice Fletcher.

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December 17.

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Where the terms of a reference provide for the appointment of an Umpire before the arbitrators enter upon the reference, until the Umpire is appointed, the reference cannot proceed.

Bright v. Durnell (1), *Dates v. Tounley* (2) followed.

MOTION.

THIS was an application made by the petitioner Chooni Lal under section 11, sub-section (2) of the Indian Arbitration Act for an order that an award made by the Bengal Chamber of Commerce be filed and a decree made thereon. The motion came on for hearing on the 11th November 1908, and the respondent in opposing the application relied on the case of *Hardwary Mull v. Ahmed Musaji Selaji* (3), and judgment was reserved.

Thereafter, on the 25th November, under the direction of the Court the matter was further argued upon the question of the appointment of an Umpire.

Mr. C. C. Ghose for the applicant Chooni Lal. The rules of the Bengal Chamber of Commerce contemplate the appointment of an Umpire only when the Arbitrators disagree. This is clearly shown by reference to Rule VI. In this case, however, the Arbitrators have not disagreed at all and therefore the question of appointing an Umpire does not arise.

* Original Civil Suit No. 508 of 1908.

(1) (1836) 4 Dow. 756.

(2) (1847) 1 Ex. 572.

(3) (1903) 13 C. W. N. 63.

Mr. P. L. Buckland for the respondent. The appointment of an Umpire by the Registrar is a condition precedent to the Arbitrators entering on a reference, and until such appointment is made the tribunal to be constituted under the Rules of the Chamber for determining the dispute cannot be properly constituted.

The words in Rule VI show that not only must the Arbitrators and Umpire be appointed on receipt of an application, but their consent must be obtained before the arbitration is conducted. The proceedings in this case have all along been irregular and the contention raised by the other side is fully met by the following English cases. *Bright v. Durnell* (1) and *Bates v. Townley* (2).

Cur. adv. vult.

FLETCHER J. This is an application by the petitioner for an order that an award made by the Bengal Chamber of Commerce may be filed in Court and that a decree be passed thereon for judgment in accordance with the terms of the award. Upon the matter first coming on before me the application was opposed by the respondents on the same grounds as those raised in *Hurdwary's case* (3) with this important exception that it was not suggested in this case that the Arbitrators had allowed the time for making the award to expire before making their award.

In these circumstances I had to consider whether I ought not to remit this case to the Arbitrators.

On a more careful study of the Arbitration Rules of the Chamber of Commerce, however, it occurred to me that it was open to doubt whether the arbitral tribunal contemplated by the Rules of the Chamber of Commerce had ever been duly constituted on the ground that the Registrar had failed to appoint an Umpire. Accordingly, I set this matter down to be re-argued.

1901
CHOONI LAL
v.
MADHORAM.
—
FLETCHER J.

(1) (1836) 4 Dow. 756.

(2) (1847) 1 Ex. 572.

(3) (1903) 13 C. W. N. 63.

1903
 CROONI LAL
 V.
 MADHONAM.
 FLETCHER J.

Thus in the case of the Registrar appointing three Arbitrators under Rule VI, the rules do not contemplate that being a "case of need" in which an Umpire need be appointed, because Rule IX provides that the decision of the majority shall be taken as the decision of the Court. But in cases where two Arbitrators are appointed, Rule IX cannot apply as there can be no majority and this is, I think, at any rate a "case of need" contemplated by Rule VI.

But then it has been argued on behalf of the applicant that even if the Rules (being the terms of the reference) do provide for the appointment of an Umpire on the receipt of the application for arbitration by the Registrar, yet, as the Arbitrators did not disagree, the failure by the Registrar to appoint an Umpire does not vitiate the proceedings. This point however, in my opinion, is concluded by the authority of two cases, both being the decisions of the Full Court of Exchequer, one being the case of *Bright v. Durnell* (1) and the other being the case of *Bates v. Townley* (2).

In the case of *Bright v. Durnell* (1) the terms of the reference provided that the dispute "was to be referred to the arbitration of two persons, one to be chosen by each, who were to appoint an Umpire before they commenced proceedings."

The Arbitrators not being able to agree on the appointment of an Umpire one of the parties to the reference commenced proceedings in Court against the other party. The other party obtained a rule nisi calling on the party, who had instituted the proceedings, to show cause why the proceedings should not be stayed as the parties had agreed to refer the dispute to arbitration. The Court discharged the rule and Parke B in giving his judgment made the following pertinent remarks:—

"If the Umpire is not appointed how can we compel the Arbitrators to appoint one? And, until he is appointed, the reference cannot go on. It appears to me to be a condition precedent that an Umpire be appointed."

It is obvious that it can make no difference whether the Umpire is to be appointed by the Arbitrators or by a third

(1) (1836) 4 Dow. 756.

(2) (1847) 1 Ex. 572.

party. If the terms of the reference provided that the Umpire is to be appointed, before the Arbitrators enter upon the reference, the reference cannot go until the Umpire is appointed.

As I have already said I held that it is incumbent on the Registrar when he appoints two Arbitrators on the receipt of an application for arbitration under Rule VI, to appoint also an Umpire.

This application therefore fails and must be dismissed with costs.

Attorney for the applicant: *S. S. Bonnerjee.*

Attorneys for the respondent: *Leslie & Hinds.*

n. o. r.

1908
CHOONI LAL
MADHORAM.
FLETCHER J.

1903
CHOONI LAL
v.
MADHONAM.
FLETCHER J.

Thus in the case of the Registrar appointing three Arbitrators under Rule VI, the rules do not contemplate that being a "case of need" in which an Umpire need be appointed, because Rule IX provides that the decision of the majority shall be taken as the decision of the Court. But in cases where two Arbitrators are appointed, Rule IX cannot apply as there can be no majority and this is, I think, at any rate a "case of need" contemplated by Rule VI.

But then it has been argued on behalf of the applicant that even if the Rules (being the terms of the reference) do provide for the appointment of an Umpire on the receipt of the application for arbitration by the Registrar, yet, as the Arbitrators did not disagree, the failure by the Registrar to appoint an Umpire does not vitiate the proceedings. This point however, in my opinion, is concluded by the authority of two cases, both being the decisions of the Full Court of Exchequer, one being the case of *Bright v. Durnell* (1) and the other being the case of *Bates v. Townley* (2).

In the case of *Bright v. Durnell* (1) the terms of the reference provided that the dispute "was to be referred to the arbitration of two persons, one to be chosen by each, who were to appoint an Umpire before they commenced proceedings."

The Arbitrators not being able to agree on the appointment of an Umpire one of the parties to the reference commenced proceedings in Court against the other party. The other party obtained a rule nisi calling on the party, who had instituted the proceedings, to show cause why the proceedings should not be stayed as the parties had agreed to refer the dispute to arbitration. The Court discharged the rule and Parke B in giving his judgment made the following pertinent remarks:—

"If the Umpire is not appointed how can we compel the Arbitrators to appoint one? And, until he is appointed, the reference cannot go on. It appears to me to be a condition precedent that an Umpire be appointed."

It is obvious that it can make no difference whether the Umpire is to be appointed by the Arbitrators or by a third

(1) (1836) 4 Dow. 756.

(2) (1847) 1 Ex. 572.

party. If the terms of the reference provided that the Umpire is to be appointed, before the Arbitrators enter upon the reference, the reference cannot go until the Umpire is appointed.

As I have already said I hold that it is incumbent on the Registrar when he appoints two Arbitrators on the receipt of an application for arbitration under Rule VI, to appoint also an Umpire.

This application therefore fails and must be dismissed with costs.

Attorney for the applicant: *S. S. Bonnerjee.*

Attorneys for the respondent: *Leslie & Hinds.*

1908

CHOONI LAL
MADHORAM.

FLETCHER J.

CIVIL RULE.

Before Mr. Justice Sharfuddin and Mr. Justice Coxe.

GIRINDRA MOHAN ROY

v.

KHIR NARAYAN DAS.*

Waiver—Instalment bond—Default in payment of instalments—Limitation—Limitation Act (XV of 1877), s. 9, Sch. II, Art. 75—Cause of action—Disability or inability.

In an unregistered instalment bond there was a stipulation that in the event of default in payment of two consecutive instalments the creditor would be entitled to recover the whole amount covered by the bond, which was payable in twelve instalments. The second instalment was due on the 12th June, 1899.

The plaintiff brought a suit on the 1st June, 1903, for recovery of the instalments due on the bond, relinquishing the first two instalments:—

Held, that mere abstinence on the part of the plaintiff from bringing a suit for recovery of the whole amount due, on the failure of payment of the first two instalments, did not amount to waiver; and that limitation began to run from the 12th June 1899, when the cause of action arose. No subsequent disability or inability could arrest the running of limitation, under s. 9 of the Limitation Act.

Hurronauth Roy v. Maheroollah Mollah (1) and *Men Mohun Roy v. Doorga Churn Goode* (2) followed.

CIVIL RULE.

RULE granted to the plaintiff, Girindra Mohan Roy, a minor, by his next friend Satish Chandra Chowdhry, Manager under the Court of Wards, petitioner.

The plaintiff brought a suit for recovery of the amount due on an unregistered instalment bond executed by the defendant in the names of the adoptive mother and the step-mother of the plaintiff before his adoption. The whole amount of the bond was payable in twelve instalments, and there was a stipulation in the bond that in the event of default in payment

* Civil Rule No. 3319 of 1903, against the judgment of Ali Ahmad, Small Cause Court Judge of Rungpur, dated Aug. 14, 1903.

(1) (1867) 7 W. R. 21.

(2) (1833) 1 L. R. 15 Calc. 502.

of two consecutive instalments the creditor would be entitled to recover the entire amount due on the bond. The first instalment was payable on the 30th Falgun 1305 B. S., and the second on the 30th Joista 1306 B. S. (12th June 1899).

The plaintiff was adopted on the 2nd of July 1899, and thereupon he succeeded to the estate of his adoptive father, together with the aforesaid instalment bond.

The defendant failed to pay the instalments, and the suit was brought on the 1st June 1908 for recovery of the instalments due on the bond, relinquishing the first two instalments, which had become due before his adoption.

The defendant contended that as the cause of action to recover the whole amount arose on the 12th June 1899 (the date on which the second instalment fell due) the suit was barred by limitation.

The Court below dismissed the suit on the ground that it was barred by limitation.

The plaintiff, thereupon, moved the High Court and obtained this Rule.

The Advocate-General (Hon'ble Mr. S. P. Sinha) (Babu Umakali Mookerjee and Babu Debendra Nath Bagchi with him), for the petitioner. It is optional with the creditor, under the bond, to sue or not for the whole amount on the first default. The plaintiff brought the suit relinquishing his claim for the first two instalments which, I submit, amounted to a waiver under Article 75, Schedule II of the Limitation Act: *Rup Narain Bhattacharya v. Gopi Nath Mandal* (1). The first two instalments became due before the plaintiff's adoption, and he, being still a minor, the cause of action arose during his minority, and his present claim is, therefore, saved from limitation.

Babu Hem Chandra Mitra (Babu Atul Chandra Dutt with him), for the opposite party. There is no distinction between an optional and compulsory institution of suit. A mere

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abstinence from suing, or mere payment and receipt of overdue instalments do not amount to a waiver: *Bilaji Ganesh v. Sakharam Parashram Angal* (1), *Mumford v. Peal* (2). To constitute a waiver there must be payment and circumstances clearly indicating an intention to waive. The limitation runs, in this case, from the time when default was made in payment of the second instalment in consequence of which the whole amount became due: the claim is therefore barred by limitation. Reliance was placed on the following cases:—*Hurranauth Roy v. Maheroollah Moollah* (3), *Nobodip Chunder Shaha v. Ram Krishna Roy Chowdhry* (4), *Mon Mohun Roy v. Doorga Churn Gooee* (5), *Hurri Pershad Chowdhry v. Nasib Singh* (6), *Sitab Chand Nahar v. Hyder Malla* (7), *Jadab Chandra Bakshi v. Bhairab Chandra Chuckerbutty* (8), *Nagappa v. Ismail* (9), *Hemp v. Garland* (10), *Chenibash Shaha v. Kadum Mandul* (11).

Babu Debendra Nath Bagchi, in reply, referred to *Badi Bibi Sahibal v. Sami Pillai* (12), and also to *Chunder Komal Das v. Bisassurree Dassia* (13), *Nobocomar Mookhopadhyay v. Siru Mullick* (14), *Ganesh Krishn v. Madharrav Ravji* (15) and *Nilmadhub Chuckerbutty v. Ramsodoy Ghose* (16), on which the case of *Rup Narain Bhattacharya v. Gopi Nath Mandol* (17) was based.

Cur. adv. vult.

SHARFUDDIN AND COXE JJ. This is a Rule granted to the petitioner under section 25 of the Provincial Small Cause Court Act.

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| (1) (1892) I. L. R. 17 Bom. 555. | (9) (1889) I. L. R. 12 Mad. 192. |
| (2) (1880) I. L. R. 2 All. 857. | (10) (1843) 4 Q. B. 519. |
| (3) (1867) 7 W. R. 21. | (11) (1879) I. L. R. 5 Calc. 97. |
| (4) (1887) I. L. R. 14 Calc. 397. | (12) (1892) I. L. R. 18 Mad. 237. |
| (5) (1888) I. L. R. 15 Calc. 502. | (13) (1883) 13 C. L. R. 243. |
| (6) (1894) I. L. R. 21 Calc. 542. | (14) (1880) I. L. R. 6 Calc. 94. |
| (7) (1896) I. L. R. 24 Calc. 281. | (15) (1881) I. L. R. 6 Bom. 75. |
| (8) (1904) I. L. R. 31 Calc. 297. | (16) (1883) I. L. R. 9 Calc. 857. |
| (17) (1906) 11 C. W. N. 903. | |

The facts giving rise to the present Rule are that the petitioner was adopted on the 2nd of July, 1899 (18th of Sravan 1306). His adoptive mother and step-mother were in temporary possession of the estate as Hindu widows with limited rights, which ceased on the date of the petitioner's adoption.

Along with the estate to which the petitioner succeeded on his adoption there was also an instalment bond executed by the defendant in favour of the two ladies mentioned above.

The instalment bond above referred to stipulated for payment of the money covered by it in twelve instalments, falling due on the dates mentioned in the bond, the second instalment falling due on the 30th Jaista 1306. There was a further stipulation in the bond to the effect that in the event of default in payment of two consecutive instalments, the creditor would be at liberty to recover the entire amount due on the bond.

It appears that the petitioner was a minor when adopted, and is still a minor. It further appears that the defendants have failed to pay any instalment of the bond.

30th Jaista 1306 (12th June 1899) was the date on which the 2nd instalment was due, and under the stipulation in the bond, the cause of action arose on that date as the defendants had failed to pay two consecutive instalments. The adoption of the petitioner took place, as observed before, on the 2nd of July 1899, i.e., within three weeks of the date when the cause of action arose. This instalment bond is an unregistered document, and, if the cause of action arose on the 12th, June 1899, it was contended that, the suit having been brought on the 1st of June 1908, was barred by the Statute of Limitation.

The lower Court has dismissed the suit holding that the plaintiff's case is barred by Limitation, and the plaintiff has obtained the present Rule from this Court.

It is contended that the Article of the Limitation Act, that governs the present case, is Article 75, Schedule II, Act XV of 1877. The limitation therein provided is three years from the date when the first default is made, unless the payee or obligee

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abstinence from suing, or mere payment and receipt of overdue instalments do not amount to a waiver: *Balaji Ganesh v. Sakharam Parashram Angal* (1), *Mumford v. Peal* (2). To constitute a waiver there must be payment and circumstances clearly indicating an intention to waive. The limitation runs, in this case, from the time when default was made in payment of the second instalment in consequence of which the whole amount became due: the claim is therefore barred by limitation. Reliance was placed on the following cases:—*Hurronauth Roy v. Maheroollah Moollah* (3), *Nobodip Chunder Shaha v. Ram Krishna Roy Chowdhry* (4), *Mon Mohun Roy v. Doorga Churn Goode* (5), *Hurri Pershad Chowdhry v. Nasib Singh* (6), *Sitab Chand Nahar v. Hyder Malla* (7), *Jadab Chandra Bakshi v. Bhairab Chandra Chuckerbutty* (8), *Nagappa v. Ismail* (9), *Hemp v. Garland* (10), *Chenibash Shaha v. Kadum Mandul* (11).

Babu Debendra Nath Bagchi, in reply, referred to *Badi Bibi Sahibul v. Sami Pillai* (12), and also to *Chunder Komal Das v. Bisassurree Dassia* (13), *Nobocomar Mookhopadhyay v. Siru Mullick* (14), *Ganesh Krishn v. Madhavray Ravji* (15) and *Nilmadhub Chuckerbutty v. Ramsodoy Ghose* (16), on which the case of *Rup Narain Bhattacharya v. Gopi Nath Mandol* (17) was based.

Cur. adv. vult.

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(3) (1867) 7 W. R. 21.

(4) (1887) I. L. R. 14 Calc. 397.

(5) (1888) I. L. R. 15 Calc. 502.

(6) (1891) I. L. R. 21 Calc. 542.

(7) (1896) I. L. R. 24 Calc. 281.

(8) (1904) I. L. R. 31 Calc. 297.

(9) (1889) I. L. R. 12 Mad. 192.

(10) (1843) 4 Q. B. 619.

(11) (1879) I. L. R. 5 Calc. 97.

(12) (1892) I. L. R. 18 Mad. 257.

(13) (1883) 13 C. L. R. 243.

(14) (1880) I. L. R. 6 Calc. 94.

(15) (1881) I. L. R. 6 Bom. 75.

(16) (1883) I. L. R. 9 Calc. 857.

(17) (1906) 11 C. W. N. 903.

The facts giving rise to the present Rule are that the petitioner was adopted on the 2nd of July, 1899 (18th of Sravan 1306). His adoptive mother and step-mother were in temporary possession of the estate as Hindu widows with limited rights, which ceased on the date of the petitioner's adoption.

Along with the estate to which the petitioner succeeded on his adoption there was also an instalment bond executed by the defendant in favour of the two ladies mentioned above.

The instalment bond above referred to stipulated for payment of the money covered by it in twelve instalments, falling due on the dates mentioned in the bond, the second instalment falling due on the 30th Jaista 1306. There was a further stipulation in the bond to the effect that in the event of default in payment of two consecutive instalments, the creditor would be at liberty to recover the entire amount due on the bond.

It appears that the petitioner was a minor when adopted, and is still a minor. It further appears that the defendants have failed to pay any instalment of the bond.

30th Jaista 1306 (12th June 1899) was the date on which the 2nd instalment was due, and under the stipulation in the bond, the cause of action arose on that date as the defendants had failed to pay two consecutive instalments. The adoption of the petitioner took place, as observed before, on the 2nd of July 1899, i.e., within three weeks of the date when the cause of action arose. This instalment bond is an unregistered document, and, if the cause of action arose on the 12th, June 1899, it was contended that, the suit having been brought on the 1st of June 1908, was barred by the Statute of Limitation.

The lower Court has dismissed the suit holding that the plaintiff's case is barred by Limitation, and the plaintiff has obtained the present Rule from this Court.

It is contended that the Article of the Limitation Act, that governs the present case, is Article 75, Schedule II, Act XV of 1877. The limitation therein provided is three years from the date when the first default is made, unless the payee or obligee

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waives the benefit of the stipulation to sue for the whole amount of the bond, and then from the date when the fresh default is made in respect of which there is no such waiver.

It is contended on behalf of the petitioner that the suit was brought after distinctly waiving his claim for the first two instalments, which had fallen due before his adoption and that hence the "cause of action" arose during his minority and his claim was, therefore, saved from limitation.

Under section 9 of the Limitation Act (XV of 1877) "when once time has begun to run no subsequent disability or inability to sue stops it." If the limitation began to run from 12th June, 1899, the due date of the second instalment under section 9 of the Limitation Act, the petitioner's adoption some three weeks after that date could not arrest the limitation, which had already commenced to run, unless the right to sue on two consecutive instalments falling due was waived. The whole question therefore hinges on the question of waiver.

A number of authorities has been referred to by the parties in support of their respective contentions.

There is no allegation in the present case that there was any acceptance on the part of the plaintiff of the overdue instalments.

It is contended on his behalf that his relinquishment of his claim for the first two instalments amounts to a waiver as contemplated by Article 75, Schedule II of the Limitation Act (XV of 1877), and in support of his contention our attention has been drawn to various authorities, of which the most recent is the case of *Rup Narain Bhattacharya v. Gopi Nath Mandol* (1), where it was decided, that the proviso in the bond having been inserted for the advantage of the creditor, it was open to him, if default were made, to sue at once for the whole amount, or if he so elected, to waive the benefit of the proviso, which was thus conferred upon him. In that suit no claim was made for the first instalment on the non-payment of which the benefit of the

proviso was conferred upon the plaintiff. We further find in this reported case the following observation:—"The question therefore is, whether the suit is barred altogether or whether the plaintiff waiving, as he has done, the benefit of the proviso, to which I have referred, is not entitled to the instalments, which have accrued due within the limit of six years from the date of suit." This suit was upon a registered instalment bond. The authorities relied upon in this case were *Chunder Komal Das v. Bisassurree Dassia* (1), *Nobocoomar Mookhopadhyaya v. Siru Mullick* (2), *Ganesh Krishn v. Madhavray Ravji* (3), and *Nil-madhub Chuckerbutty v. Ramsodoy Ghose* (4). It is not clearly stated in this judgment whether abstinence from bringing the suit for the whole claim was considered as in itself a sufficient waiver in law, and the only fact stated is that the suit was not for the over-due instalment. It is stated that the plaintiff had waived the benefit of the proviso, but it is not clear how he waived it.

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In the case of *Chunder Komal Das v. Bisassurree Dassia* (1), it was held that an application for the execution of an instalment decree was not barred except as to the instalments, which had fallen due more than three years before, and that it was optional with the decree-holder to realize the whole decree at once upon default being made or to waive his right to do so and seek to realize instalments as they became due. This was so held following *Asmutullah Dalal v. Kally Churn Mitter* (5), which was also followed in the case of *Nil Madhub Chuckerbutty v. Ramsodoy Ghose* (4). We find in the last-mentioned case that the decision hinged on the construction of the decree. The wording of that decree is not given in the judgment, but is said to have been obscure.

The cases of *Nobocoomar Mookhopadhyaya v. Siru Mullick* (2) and *Ganesh Krishn v. Madhavray Ravji* (3) have no application to the present case.

(1) (1883) 13 C. L. R. 243

(3) (1881) I. L. R. 6 Bom. 75.

(2) (1880) I. L. R. 6 Calc. 94.

(4) (1883) I. L. R. 9 Calc. 837

(5) (1881) I. L. R. 7 Calc. 54.

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In the case of *Nitmadhub Chuckerbutty v. Ramsodoy Ghose* (1), the execution was allowed to proceed on the ground that the judgment-debtor had paid up the over-due instalment, which was accepted by the decree-holder, and hence it was held that limitation began to run in this case from the time when the judgment-debtor stopped making any payment.

On behalf of the respondent, on the other hand, a number of authorities have been placed before us in support of his contention that the suit was barred by limitation. We propose to take up and discuss these authorities one by one.

In *Chenibash Shaha v. Kadam Mundul* (2), it was held that, when a debt is made payable by instalments with the proviso that on default of payment of any one instalment, the whole or so much as may then remain unpaid will become due, limitation runs from the time of the first default. A subsequent acceptance of the instalment in arrear operates as a waiver and suspends the operation of the law of Limitation: but merely allowing the default to pass unnoticed does not. The word waiver in this authority has been explained to mean that, where the whole amount secured by the instalments becomes payable on default of payment of the first instalment and the payee, instead of taking measures to recover the whole amount, accepts payment of the instalment in default, he must wait till there is a fresh default in the matter of the recovery of the remainder. It was further remarked in this case that the non-receipt of the particular instalment or suffering it to fall through by operation of the Statute of Limitation is not a waiver as, if this were so, waiver and *laches* would be convertible terms and the object of the law of Limitation would be frustrated.

In *Nojolip Chunder Shaha v. Ram Krishna Roy Chowdhry* (3), it was held that the mere fact that a creditor had done nothing to enforce the condition in an instrument under which the whole debt became due on failure of payment of one

(1) (1883) I. L. R. 9 Calc. 857.

(2) (1879) I. L. R. 5 Calc. 97.

(3) (1897) I. L. R. 14 Calc. 397.

instalment, is no evidence of waiver within the meaning of the Limitation Act. In this case the instalments had been unpaid for sometime and, as a matter of fact, the time that the last payment was made was so long ago that, if the whole amount became due at that time, the cause of action was barred, and upon that state of things the question that arose was whether the mere fact that the creditor had done nothing, but simply allowed the matter to sleep without enforcing his remedy against the debtor, was any evidence of waiver within the meaning of the Limitation law. It was held that such a condition of things would be no evidence of waiver.

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In *Monmohun Roy v. Doorga Churn Gooc* (1), it was held that, where a decree or order makes a sum of money payable by instalments on certain dates and provides that, in default of payment of any instalment the whole of the money shall become due and payable and recoverable in execution, limitation begins to run from the date of the first default, unless the right to enforce payment has been waived by subsequent payment of the over-due instalment on the one hand and receipt on the other. It was held that the application was barred by limitation. The learned Judges, who decided this case, followed a decision of the Full Bench in the case of *Hurro-nauth Roy v. Maheroollah Moollah* (2), where it was held that limitation ran from the time when default was made in the payment of the first instalment in consequence of which the whole amount became due. The decision of the Full Bench was upon a reference made by the Judge of the Small Cause Court at Kushtea. The above decision of the Full Bench is supported by an English case, viz., *Hemp v. Garland* (3). In this English case it was held that, when a note payable by instalments contains a provision that, if default be made in payment of one instalment, the whole shall be due, the cause of action arises upon the first default for all that then remained

(1) (1888) L. L. R. 15 Calc. 502.

(2) (1867) 7 W. R. 21.

(3) (1843) 4 Q. R. 519

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owing of the whole debt, and limitation has to be computed from the date of such default.

In *Hurri Pershad Chowdhry v. Nasib Singh* (1), it was held that a clause in the decree to the effect that on non-payment of an instalment by the specified date it should be in the power of the decree-holder to realize the whole amount was not intended to give him the option of waiving the default, if he pleased, but that it implied nothing more than the usual condition that on non-payment of an instalment the whole decretal amount becomes exigible. It was further held that, as the first instalment had not been paid on the due date, the application for execution not having been made within three years from the date when the whole amount became due was barred by limitation. It was also held in this case that mere abstinence from suing cannot amount to a waiver.

Sitab Chand Nahar v. Hyder Mallah (2) was a case of a mortgage-bond executed by the defendants whereby a sum of money was made payable by four instalments and the plaintiff was given the liberty in case of any default to sue either for the amount of that instalment or for the whole amount then due; it was held that limitation ran from the date of the first default. In this case it was remarked that, where there is an optional right given to enforce payment of money, such right may be waived, but when it is not waived or where there is nothing to show that it has been waived, limitation would run from the date when the right accrues. The learned Judges, who decided this case, relied upon certain observations of Lord Denman, Chief Justice, in *Hemp v. Garland* (3) referred to above—the observations being.—“That if he (plaintiff) chose to wait till all the instalments become due no doubt he might do so; but that which was optional on the part of the plaintiff would affect the right of the defendant, who might well consider the action as accruing from the time the plaintiff had a right to maintain it.” The learned Judges, who decided this case, further remarked

(1) (1894) I. L. R. 21 Calc. 542.

(2) (1896) I. L. R. 24 Calc. 281.

(3) (1843) 4 Q. B. 519.

that the money sued for became due according to the terms of the bond when the first default in the payment of an instalment was made and it became due none the less because the right to enforce immediate payment was optional with the creditor.

Jadab Chandra Bakshi v. Bhairab Chandra Chuckerbutty (1) was a case of an instalment-bond wherein it was stipulated that on default being made in payment of any one instalment, the creditor would be at liberty to realize the amount covered by all the instalments. It was held that in such a case limitation would run from the date of the first default, unless there was a waiver by the creditor of the right to demand the whole on a default by subsequent acceptance of an over-due instalment. The learned Judges, who decided this case, dissented from the decision in the case of *Chunder Komal Das v. Bisassurree Das* (2), and followed the decision in the case of *Hurri Pershad Chowdhry v. Nasib Singh* (3).

The preponderance of the authorities supported by the decision of the Full Bench quoted above is to the effect that in the case of instalment bonds with the stipulation of the whole debt becoming due on the failure of payment of a certain instalment limitation would begin to run from the date of the non-payment of that instalment, unless there has been a waiver by the decree-holder by the acceptance of the over-due instalment.

In view of the conflicting rulings on the subject of waiver, we feel bound to follow the decision of the Full Bench in the case of *Hurronauth Roy v. Maheroollah Moollah* (4). It is true that that case was decided under Act XIV of 1859, in which there was no provision corresponding to Article 75. But it was followed in *Monmohan Roy v. Doorga Churn Gooee* (5) in 1888, and the principle it embodies, in our opinion, is still the law.

We hold that mere abstinence on the part of the plaintiff in this case from bringing a suit for the recovery of the whole

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(1) (1904) I. L. R. 31 Calc. 297.

(3) (1894) I. L. R. 21 Calc. 542.

(2) (1883) 13 C. L. R. 243.

(4) (1867) 7 W. R. 21.

(5) (1888) I. L. R. 15 Calc. 502.

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amount due on the failure of the payment of the first two instalments did not amount to waiver. The cause of action arose on the 12th June 1899 and limitation began to run from that date. Under section 9 of the Limitation Act, no subsequent disability or inability could arrest the running of limitation.

In the above circumstances, we think that the judgment of the Small Cause Court is correct, and we therefore discharge the present Rule.

Rule discharged.

B. D. B

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PART VI.

THE INDIAN LAW REPORTS.

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CALCUTTA SERIES,

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT CALCUTTA AND
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 Editor ... B. D. BOSE, *Barrister-at-Law (Offg.)*.

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General Acts of the Governor-General of India in Council, Vol. I, from 1834 to 1867. Edition 1898 ...	7	0	0	[10a.]
General Acts of the Governor-General of India in Council, Vol. II, from 1868 to 1876. Edition 1898 ...	5	0	0	[10a.]
General Acts of the Governor-General of India in Council, Vol. III, from 1877 to 1891. Edition 1898 ...	5	0	0	[9a.]
General Acts of the Governor-General of India in Council, Vol. IV, from 1892 to 1894. Edition 1898 ...	7	0	0	[10a.]
General Acts of the Governor-General of India in Council, Vol. V, from 1895 to 1899. Edition 1898 ...	5	0	0	[9a.]
General Acts of the Governor-General of India in Council, Vol. VI, from 1891 to 1898. Edition 1898 ...	7	0	0	[10a.]
General Acts of the Governor-General of India in Council, Vol. VII, from 1899 to 1903, inclusive. Edition 1904 ...	3	0	0	[6a.]

C.—LOCAL CODES.

The Ajmere Code, Third Edition, 1905, containing the Enactments in force in Ajmere-Merwara, with an Appendix consisting of a list of the Enactments which have been declared in force in or extended to Ajmere-Merwara by notification under the Scheduled Districts Act, 1874; a Chronological Table and an Index ...	2	8	0	[7a].
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	Rs. A. P.
The Baluchistan Code, Edition, 1900, containing the local enactments in force in British Baluchistan and the Agency territories, with Chronological Tables and an Index ...	5 0 0 [10a.]
The Burma Code, Edition, 1899 ...	5 0 0 [9a.]
The Central Provinces Code, Third Edition, 1905, consisting of the Bengal Regulations and the Local Acts of the Governor General in Council in force in the Central Provinces, with an Appendix containing a list of the Acts which have been applied to the Scheduled Districts of the Central Provinces by notification under the Scheduled Districts Act, 1874; and an Index ...	4 0 0 [6a.]
The Madras Code, Vols. I and II. Edition, 1902 ...	12 0 0 [H.]
The Punjab and North-West Code, Edition, 1903, consisting of the unrepealed enactments locally in force in the Punjab and the North-West Frontier Province, with Appendix and Index ...	6 0 0 [10a.]

II.—REPRINTS OF ACTS AND REGULATIONS OF THE GOVERNOR-GENERAL OF INDIA IN COUNCIL AS MODIFIED BY SUBSEQUENT LEGISLATION.

Acts X of 1841 and XI of 1850 (Registration of Ships), as modified up to 1st December, 1893 (with foot-notes brought down to 1st December, 1901) ...	0 7 0 [1a.]
Act XX of 1847 (Copyright), as modified up to 1st December, 1903 ...	0 5 0 [1a.]
Act XVIII of 1850 (Judicial Officers' Protection), with foot notes ...	0 1 9 [1e.]
Act XIX of 1850 (Apprentices), as modified up to 1st May, 1905 ...	0 3 0 [1a.]
Act XXXIV of 1850 (State Prisoners), as modified up to 30th April, 1903 ...	0 2 8 [1a.]
Act VIII of 1851 (Tolls on Roads and Bridges), as modified up to 1st June, 1897 ...	0 2 0 [1a.]
Act XII of 1855 (Legal Representatives' Suits), as modified up to 1st November, 1904 ...	0 1 0 [1a.]
Act XIII of 1855 (Fatal Accidents), as modified up to 1st December, 1903 ...	0 2 0 [1a.]
Act XXVIII of 1855 (Usury Laws Repeal), as modified up to 1st December, 1903 ...	0 1 6 [1a.]
Act XX of 1858 (Police Chaukidars), as modified up to 1st November, 1903 ...	0 7 0 [1a.]
Act IV of 1857 (Tobacco, Bombay Town), as modified up to 1st August, 1895 ...	0 3 9 [1a.]
Act XXIX of 1857 (Land Customs, Bombay), as modified up to 1st December, 1895 ...	0 4 0 [1a.]
Act III of 1858 (State Prisoners), as modified up to 1st August 1897 ...	0 2 0 [1a.]
Act XXXIV of 1858 [Lunacy (Supreme Courts)] as modified up to 30th April, 1903 ...	0 4 3 [1a.]
Act XXXV of 1858 [Lunacy (District Courts)], as modified up to 30th April 1903 ...	0 2 3 [1a.]
Act XXXVI of 1858 (Lunatic Asylums), as modified up to 31st May, 1902 ...	0 5 0 [1a.]

	Ra. A. R.
Act I of 1859 (Merchant Shipping), as modified up to 30th June, 1905	0 13 0 [2a.]
Act XI of 1859 (Bengal Land Revenue Sales), as modified up to 1st August, 1900	0 4 0 [1a.]
Act XIII of 1859 (Workman's Breach of Contract), as affected by Act XVI of 1874	0 1 0 [1a.]
Act IX of 1860 (Employers and Workmen (Disputes)), as modified up to 1st December, 1904	0 1 6 [1a.]
Act XXI of 1860 (Societies Registration), as modified up to 1st December, 1904	0 2 9 [1a.]
Act XLV of 1860 (Indian Penal Code), as modified up to 1st April 1903, with an Index	2 8 0 [5a.]
Act V of 1861 (Police), as modified up to 7th March, 1903	0 7 0 [1a. Op.]
Act XVI of 1861 (Stage-carriages), as modified up to 1st February, 1898	0 3 6 [1a.]
Act XXIII of 1863 (Claims to Waste-lands), as modified up to 1st December, 1890	0 4 9 [1a.]
Act III of 1864 (Foreigners), as modified up to 1st September, 1900	0 3 8 [1a.]
Act VI of 1864 (Whipping), as modified up to 1st August, 1905	0 3 0 [1a.]
Act XVII of 1864 (Official Trustees), as modified up to 1st July 1800	0 5 8 [1a.]
Act I of 1865 (Carriers), as modified up to 31st May, 1903	0 3 0 [1a.]
Act X of 1865 (Succession), as modified up to 1st July, 1890	1 8 0 [2a.]
Act III of 1867 (Gambling), as modified up to 1st January, 1905... ..	0 4 0 [1a.]
Act V of 1869 (Indian Articles of War), as modified up to 1st December, 1904	1 2 0 [3a.]
Act XX of 1869 (Volunteers), as modified up to 1st May, 1800	0 4 0 [1a.]
Act of 1871 (Galle Trespas), as modified up to 1st May, 1906	0 8 0 [1a.]
Act IV of 1872 (Punjab Laws), as modified up to 1st November, 1904	0 7 0 [1a.]
Act XV of 1872 (Christian Marriage), as modified up to 1st December, 1904	0 10 0 [2a.]
Act V of 1873 (Government Savings Bank), as modified up to 1st April, 1903	0 3 6 [1a.]
Act X of 1873 (Oaths), as modified up to 1st February, 1903	0 3 0 [1a.]
Act II of 1874 (Administrator General), as modified up to 1st July, 1890; with a list of Native States included within the Presidencies of Bengal, Madras and Bombay, respectively, for the purposes of the Act	0 11 0 [2a.]
Act IX of 1874 (European Vagrancy), as modified up to 1st December, 1901	0 6 8 [1a.]
Act XIV of 1874 (Scheduled Districts), as modified up to 1st October, 1895	0 6 0 [1a.]
Act XV of 1874 (Laws Local Extent), as modified up to 1st October, 1895	0 7 0 [1a.]
Act IX of 1875 (Indaln Majority), as modified up to 1st May, 1906	0 2 0 [1a.]
Act of 1877 (Specific Relief), as modified up to 1st February 1904	0 11 0 [1a. 6p.]

						Ra. a. r.
Act III of 1877 (Registration), as modified up to 1st August 1905	...	...	...	...	...	0 11 0 [2a.]
Act VII of 1878 (Forests), as modified up to 1st December, 1903	...	...	...	...	...	0 10 0 [2a.]
Act XVII of 1878 (Ferries), as modified up to 1st June, 1902	...	...	...	...	...	0 6 0 [1a.6p.]
Act XVII of 1879 (Dekkhan Agriculturists' Relief), as modified up to 1st March, 1895	...	...	...	...	...	0 10 0 [2a.]
Act XVIII of 1878 (Legal Practitioners), as modified up to 1st May, 1890	...	...	...	...	...	0 7 0 [1a.]
Act VII of 1880 (Merchant Shipping), as modified up to 15th October, 1891	...	...	...	...	...	0 10 0 [2a.]
Act V of 1881 (Probate and Administration), as modified up to July, 1890	...	...	...	...	...	0 12 0 [2a.]
Act XV of 1881 (Factories), as modified up to 1st December 1904	...	...	...	...	...	0 8 8 [1a.6p.]
Act XXVI of 1881 (Negotiable Instruments), as modified up to 1st August, 1897	...	...	...	...	...	0 10 0 [1a.]
Act XVIII of 1881 (Central Provinces Land-revenue), as modified up to 1st March, 1905	...	...	...	...	...	1 2 0 [2a.]
Act II of 1882 (Trusts), as modified up to 1st June 1903	...	...	...	...	...	0 10 0 [3a.]
Act IV of 1882 (Transfer of Property), as modified up to 1st December, 1905	...	...	...	...	...	0 15 0 [2a.]
Act V of 1882 (Indian Easements), as amended by the Repealing and Amending Act, 1891 (XII of 1891)	...	...	...	...	...	0 8 0 [1a.]
Act VI of 1882 (Companies), as modified up to 1st August 1900	...	...	...	...	...	1 10 0 [3a.]
Act XII of 1882 (Salt), as modified up to 1st December 1890	...	...	...	...	...	0 6 0 [1a.]
Act XIV of 1882 (Code of Civil Procedure), as modified up to 1st December, 1899	...	...	...	...	...	3 0 0 [6a.]
Act XV of 1882 (Presidency Small Cause Court), as modified up to 1st June, 1900	...	...	...	...	...	0 10 0 [2a.]
Act V of 1883 (Indian Merchant Shipping), as modified up to 1st December, 1904	...	...	...	...	...	0 6 0 [1a.]
Act VIII of 1883 (Lilloo Cocos and Preparis Island) as modified up to 1st October, 1902	...	...	...	...	...	0 1 3 [1a.]
Act XIX of 1893 (Land Improvement Loans), as modified up to 1st September, 1906	...	...	...	...	...	0 2 6 [1a.]
Act XXI of 1883 (Emigration), as modified up to 1st December, 1902	...	...	...	...	...	0 11 0 [2a.]
Act VI of 1884 (Inland Steam-vessels), as modified up to 1st July, 1891	...	...	...	...	...	0 0 0 [2a.]
Act VII of 1884 (Steam-ships), as modified up to 1st July, 1890	...	...	...	...	...	0 6 0 [1a.]
Act XII of 1884 (Agriculturists' Loans), as modified up to 1st February, 1903	...	...	...	...	...	0 2 0 [1a.]
Act XVIII of 1884 (Punjab Courts), as modified up to 1st December, 1899	...	...	...	...	...	0 7 0 [1a.]
Act XIII of 1885 (Indian Telegraph), as modified up to 1st March, 1905	...	...	...	...	...	0 5 0 [1a.]
Act II of 1885 (Income-tax), as modified up to 1st April 1903	...	...	...	...	...	0 8 8 [1a.6p.]

	Rs.	A.	P.	
Act VI of 1886 (Births, Marriages and Death Registration), as modified up to 1st June, 1891	0	6	0	[1a.]
Act XI of 1888 (Tramways) as modified up to 1st December, 1903	0	9	0	[2a.]
Act XIII of 1886 (Securities), as amended by Act XII of 1891	0	2	9	[1a.]
Act VII of 1887 (Suits Valuation), as modified up to 1st October, 1904	0	1	9	[1a.]
Act IX of 1887 (Provincial Small Cause Courts), as modified up to 1st December, 1900	0	6	0	[1a.]
Act XIV of 1887 (Indian Marine), as modified up to 15th February, 1899	0	8	0	[1a.]
Act V of 1888 (Inventors and Designs), as modified up to 1st July, 1903	0	9	0	[2a.]
Act I of 1889 (Metal Tokens), as modified up to 1st April, 1904	0	1	9	[1a.]
Act VII of 1889 (Succession Certificates), as modified up to 1st December, 1903	0	5	0	[1a.]
Act X of 1889 (Ports), as modified up to 1st April, 1901	0	11	0	[2a.]
Act XIII of 1889 (Cantonments), as modified up to 1st March, 1899	0	7	0	[1a.]
Act XV of 1889 (Official Secrets), as modified up to 1st April, 1904	0	3	0	[1a.]
Act IX of 1890 (Railways), as modified up to 1st June 1905 with an Index	1	2	0	[2a.]
Act X of 1890 (Press and Registration of Books), as modified up to 1st December, 1903	0	2	3	[1a.]
Act XII of 1891 (Repealing and Amending Act), shewing the Schedules as modified up to 31st May 1902	0	12	0	[1a. 6p.]
Act XIV of 1891 (Oudh Courts), as amended by the Oudh Courts Act (1891) Amendment Act, 1897	0	1	3	[1a.]
Act I of 1894 (Land Acquisition), with footnotes	0	7	0	[1a.]
Act VIII of 1894 (Tariff), as modified up to 1st February, 1906	0	0	0	[2a.]
Act IX of 1894 (Prisons), as amended by the Burma Laws Act, 1898	0	7	6	[1a. 6p.]
Act IX of 1897 (Provident Funds), as modified up to 1st April, 1903	0	1	6	[1a.]
Act V of 1896 (Code of Criminal Procedure), as modified up to 1st April, 1903	3	10	0	[8a.]
Act VIII of 1899 (Petroleum), as modified up to 1st December 1904	0	7	0	[1a.]
Act XIX of 1899 (Currency Conversion (Army)), as amended by Act VII of 1900	0	1	0	[1a.]
Act III of 1900 (Prisoners), as modified up to 1st March 1903	0	6	6	[1a.]
Act XV of 1903 (Extradition), as modified up to 1st December, 1904	0	5	6	[1a.]
Regulation III of 1872 (Sonthal Parganas Settlement), as modified up to 1st October, 1899	0	6	6	[1a.]
Regulation V of 1873 (Bengal (Eastern) Frontier), as modified up to 1st July 1903	0	1	0	[1a.]
Regulation III of 1876 (Andaman and Nicobar Islands), as modified up to 1st February, 1907	0	6	6	[1a.]

					Rs. A. P.
Regulation I of 1886 (Assam Land and Revenue), as modified up to 1st June, 1894	...	...	...	...	0 13 0 [2a]
Regulation VI of 1888 (Ajmer Rural Boards), as modified up to 1st February, 1895	...	...	...	...	0 5 6 [1a.]
Regulation XIV of 1887 (Upper Burma Villages), as modified up to 1st April, 1891	...	...	...	...	0 5 0 [1a.]
Regulation IV of 1893 (Sonhat Parganas Justice), as modified up to 1st October, 1899	...	...	...	...	0 4 9 [1a.]
Regulation I of 1895 (Kachin Hill Tribes), as modified up to 1st April, 1902	...	...	...	...	0 6 0 [1a.]

III.—ACTS AND REGULATIONS OF THE GOVERNOR-GENERAL OF INDIA IN COUNCIL AS ORIGINALLY PASSED.

Acts (unrepeated) of the Governor-General of India in Council from 1854 to 1908.

Regulations made under the Statute. 33 Vict., Cap. 3 from No. II of 1875 to 1908. Svo, Stitched.

[The above may be obtained separately. The price is noted on each.]

IV.—TRANSLATION OF ACTS AND REGULATIONS OF THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

Acts X of 1841 and XI of 1850 (Registration of Ships), as modified up to 1st December, 1893, with foot-notes brought down to 1st December, 1901	...	...	In Urdu	...	0 2 8 [1a.]
Act XX of 1847 (Copyright), as modified up to 1st May, 1890	...	...	{ In Urdu In Nagri	...	0 1 3 [1a.] 0 1 3 [1a.]
Act XVIII of 1850 (Judicial Officers' Protection) with foot-notes	...	...	{ In Urdu In Nagri	...	0 0 0 [1a.] 0 0 0 [1a.]
Act XXXIV of 1850 (State Prisoners), as modified up to 30th April, 1903	...	...	{ In Urdu In Nagri	...	0 0 0 [1a.] 0 0 0 [1a.]
Act XXX of 1852 (Naturalization), as modified up to 1st December, 1902	...	...	{ In Urdu In Nagri	...	0 0 6 [1a.] 0 0 0 [1a.]
Act XII of 1855 (Legal Representatives' suits) as modified up to 1st November, 1904	...	...	{ In Urdu In Nagri	...	0 0 3 [1a.] 0 0 3 [1a.]
Act XIII of 1855 (Fatal Accident), as modified up to 1st December, 1903	...	...	{ In Urdu In Nagri	...	0 0 6 [1a.] 0 0 6 [1a.]
Act XX of 1858, as modified up to 1st November, 1903	...	...	{ In Urdu In Nagri	...	0 2 6 [1a.] 0 2 6 [1a.]
Act XXXIV of 1858 [Lunacy (Supreme Courts)] as modified up to 30th April, 1903	...	...	{ In Urdu In Nagri	...	0 1 0 [1a.] 0 1 0 [1a.]
Act XXXV of 1858 [Lunacy (District Courts)], as modified up to 30th April, 1903	...	...	{ In Urdu In Nagri	...	0 1 0 [1a.] 0 1 0 [1a.]
Act XXXVI of 1858 (Lunatic Asylums), as modified up to 31st May, 1902	...	...	In Urdu	...	0 1 6 [1a.]
Act XIII of 1859 (Workman's Breach of Contract) as affected by Act XVI of 1874	...	...	{ In Urdu In Nagri	...	0 0 3 [1a.] 0 0 3 [1a.]
Act IX of 1860 (Employers and Workmen and Disputes) as modified up to 1st December, 1904	...	...	{ In Urdu In Nagri	...	0 0 3 [1a.] 0 0 3 [1a.]

				Ru. A. P.		
Act XLV of 1860 (Penal Code), as modified up to 1st April, 1903	...	...	{ In Urdu In Nagri	...	1 5 0	[5a.]
Act V of 1881 (Police), as modified up to 7th March, 1903	...	...	{ In Urdu In Nagri	...	0 2 9	[1a.]
Act XVI of 1881 (Stage-Carriages), as modified up to 1st February, 1898	...	...	{ In Urdu In Nagri	...	0 1 3	[1a.]
Act III of 1864 (Foreigners), as modified up to 1st September, 1906	...	...	{ In Urdu In Nagri	...	0 1 0	[1a.]
Act VI of 1864 (Whipping), as modified up to 1st April, 1900	...	...	{ In Urdu In Nagri	...	0 1 6	[1a.]
Act III of 1885 (Carriers) as modified up to 31st May, 1903	...	...	{ In Urdu In Nagri	...	0 0 9	[1a.]
Act III of 1887 (Gambling), as modified up to 1st December, 1898	...	...	In Nagri	...	0 2 0	[1a.]
Act V of 1889 (Indian Articles of War) as modified up to 1st January, 1895	In English, Urdu and Nagri	...	{ Bound Unbound	...	3 0 0	[5a.]
Act VII of 1870 (Court-fees), as modified up to 1st December, 1898	...	...	In Urdu	...	0 8 3	[2a. 5p.]
Ditto ditto as modified up to 1st October, 1899	...	...	In Nagri	...	0 8 9	[1a.]
Act I of 1871 (Cattle-trespass), as modified up to 1st December	...	...	{ In Urdu In Nagri	...	0 1 9	[1a.]
Act XXIII of 1871 (Pensions),	...	...	{ In Urdu In Hindi	...	0 0 9	[1a.]
Act I of 1872 (Evidence), as modified up to 1st May, 1908	...	...	{ In Urdu In Nagri	...	0 8 0	[2a.]
Act IV of 1872 (Punjab Laws), as modified up to 1st November, 1904	...	...	In Urdu	...	0 2 5	[1a. 6p.]
Act IX of 1872 (Contract), as modified up to 1st September, 1899	...	...	{ In Urdu In Nagri	...	0 0 9	[3a.]
Act XV of 1872 (Christian Marriage), as modified up to 1st April, 1891	...	...	{ In Urdu In Nagri	...	0 4 0	[2a.]
Act V of 1873 (Government Savings Bank), as modified up to 1st April, 1903	...	...	{ In Urdu In Nagri	...	0 0 9	[1a.]
Act VIII of 1873 and (Northern India Canal Drainage), as modified up to 15th July, 1899	...	...	{ In Urdu In Nagri	...	0 3 3	[1a.]
Act X of 1873 (Oaths), as modified up to 1st February, 1903	...	...	{ In Urdu In Nagri	...	0 0 0	[1a.]
Act IX of 1875 (Majority), as modified up to 1st May, 1906	...	...	{ In Urdu In Nagri	...	0 0 3	[1a.]
Act of 1877 (Specific Relief), as modified up to 1st February, 1904	...	...	{ In Urdu In Nagri	...	0 4 6	[1a. 6p.]
Act III of 1877 (Registration), as modified up to 1st December, 1896	...	...	{ In Urdu In Nagri	...	0 4 3	[2a.]
Act I of 1878 (Opium), as modified up to 1st December, 1896	...	...	In Nagri	...	0 1 6	[1a.]
Act VII of 1875 (Forests), as modified up to 1st December, 1903	...	...	{ In Urdu In Nagri	...	0 4 0	[1a. 6p.]
Act XI of 1878 (Arms), as modified up to 1st May, 1904	...	...	{ In Urdu In Nagri	...	0 2 0	[1a.]
Act XVI of 1875 (Northern India Ferries), as modified up to 1st June, 1902	...	...	{ In Urdu In Nagri	...	0 2 0	[1a.]

		Re. A. P.
Act XVIII of 1879 (Legal Practitioners), as modified up to 1st May, 1898	{ In Urdu In Nagri	... 0 2 6 [1a.] ... 0 2 6 [1a.]
Act XV of 1881 (Factories), as modified up to 1st April, 1891	{ In Urdu In Nagri	... 0 1 6 [1a.] ... 0 1 6 [1a.]
Act XVIII of 1881 (Central Provinces Land Revenue), as modified up to 1st November, 1898	{ In Urdu In Nagri	... 0 9 0 [1a. 6p.] ... 0 9 0 [1a. 6p.]
Act IV of 1882 (Transfer of Property), as modified up to 1st March, 1900	{ In Urdu In Nagri	... 0 6 9 [2a.] ... 0 6 9 [2a.]
Act VI of 1882 (Companies) as modified up to 1st August, 1900	{ In Urdu In Nagri	... 0 13 9 [3a.] ... 0 14 0 [3a.]
Act XIV of 1882 (Code of Civil Procedure), as modified up to 1st December, 1899	In Urdu	... 1 4 0 [1a.]
Act XIX of 1883 (Land Improvement Loans), as modified up to 1st September, 1900	{ In Urdu In Nagri	... 0 1 0 [1a.] ... 0 1 0 [1a.]
Act XXI of 1883 (Emigration), as modified up to 1st December, 1902	{ In Urdu In Nagri	... 0 4 9 [1a. 6p.] ... 0 4 6 [1a. 6p.]
Act IV of 1884 (Explosives) as modified up to 1st May, 1896	{ In Urdu In Nagri	... 0 1 3 [1a.] ... 0 1 3 [1a.]
Act VI of 1884 (Inland Steam-vessels), as modified up to 1st July, 1891	{ In Urdu In Nagri	... 0 3 6 [1a. 6p.] ... 0 3 6 [1a. 6p.]
Act XII of 1884 (Agriculturists' Loans), as modified up to 1st September, 1900	{ In Urdu In Nagri	... 0 0 6 [1a.] ... 0 0 6 [1a.]
Act XVIII of 1884 (Punjab Courts), as modified up to 1st December 1899	In Urdu	... 0 2 6 [1a.]
Act II of 1885 (Negotiable Instruments Amendment)	In Urdu	... 0 0 9 [1a.]
Act III of 1885 (Transfer of Property Amendment)	In Urdu	... 0 0 3 [1a.]
Act X of 1885 (Oudh Estates Amendment)	In Urdu	... 0 0 3 [1a.]
Act XIII of 1885 (Telegraphs), as modified up to 1st March, 1905	In Urdu	... 0 1 6 [1a.]
Act XXI of 1885 (Madras Civil Courts Amendment)	In Urdu	... 0 0 3 [1a.]
Act II of 1886 (Income-tax), as modified up to 1st April, 1903	{ In Urdu In Nagri	... 0 3 0 [1a. 9p.] ... 0 3 0 [1a. 9p.]
Act IV of 1886 (Amending Section 285 of Contract Act)	In Urdu	... 0 0 3 [1a.]
Act VI of 1886 (Births, Deaths and Marriage Registration)	In Urdu	... 0 1 3 [1a.]
Act VII of 1886 (Registration Amendments)	In Urdu	... 0 0 3 [1a.]
Act X of 1886 (Criminal Law Amendment)	In Urdu	... 0 0 9 [1a.]
Act XI of 1886 (Tramways), as modified up to 31st December, 1900	{ In Urdu In Nagri	... 0 3 3 [1a.] ... 0 3 3 [1a.]
Act XIII of 1886 (Securities), as amended by Repealing and Amending Act, 1891	{ In Urdu In Nagri	... 0 0 9 [1a.] ... 0 0 9 [1a.]
Act VI of 1887 (Companies Amendment)	In Urdu	... 0 0 3 [1a.]
Act VII of 1887 (Suits' Valuation)	In Urdu	... 0 0 9 [1a.]
Act IX of 1887 (Provincial Small Cause Courts), as modified up to 1st December, 1896	{ In Urdu In Nagri	... 0 2 3 [1a.] ... 0 2 6 [1a.]
Act X of 1887 (Native Passenger Ships)	In Urdu	... 0 1 8 [1a.]

			Rs. A. P.			
Act XII of 1887 (Bengal, North-West Provinces and Assam Civil Courts)	...	In Urdu	...	0	1	3 [1a.]
	...	In Nagri	...	0	1	3 [1a.]
Act XIV of 1897 (Indian Marine), as modified up to 15th February, 1890	...	In Urdu	...	0	3	6 [1a.]
	...	In Nagri	...	0	3	6 [1a.]
Act XV of 1887 (Burma Military Police)	...	In Urdu	...	0	0	9 [1a.]
	...	In Nagri	...	0	0	0 [1a.]
Act XVIII of 1887 (Allahabad University)	...	In Urdu	...	0	1	0 [1a.]
Act III of 1888 (Police), as modified up to 1st March, 1893	...	In Urdu	...	0	0	6 [1a.]
Ditto (as passed)	...	In Nagri	...	0	0	6 [1a.]
Act IV of 1888 (Indian Reserve Forces), as modified up to 1st March, 1893	...	In Urdu	...	0	0	3 [1a.]
Ditto (as passed)	...	In Nagri	...	0	0	3 [1a.]
Act V of 1888 (Invention and Designs)	...	In Urdu	...	0	2	3 [1a.]
Act VI of 1888 (Debtors)	...	In Urdu	...	0	0	6 [1a.]
	...	In Nagri	...	0	0	6 [1a.]
Act VII of 1888 (Civil Procedure Amendment)	...	In Urdu	...	0	1	9 [1a.]
	...	In Nagri	...	0	1	8 [1a.]
Act I of 1889 (Metal Tokens), as modified up to 1st April, 1904	...	In Urdu	...	0	0	6 [1a.]
	...	In Nagri	...	0	0	6 [1a.]
Act II of 1889 (Measures of Length)	...	In Urdu	...	0	0	3 [1a.]
	...	In Nagri	...	0	0	3 [1a.]
Act VI of 1889 (Merchandise Marks), as modified up to 1st February, 1904	...	In Urdu	...	0	1	8 [1a.]
	...	In Nagri	...	0	2	0 [1a.]
Act VI of 1889 (Probate and Administration)	...	In Urdu	...	0	0	8 [1a.]
	...	In Nagri	...	0	0	8 [1a.]
Act X of 1889 (Ports), as modified up to 1st June, 1904	...	In Urdu	...	0	6	0 [2a.]
	...	In Nagri	...	0	5	0 [2a.]
Act XIII of 1889 (Cantonments), as modified up to 1st March, 1905	...	In Nagri	...	0	3	0 [1a. 3p.]
Act XV of 1889 (Official Secrets), as modified up to 1st April, 1904	...	In Urdu	...	0	0	8 [1a.]
	...	In Nagri	...	0	0	9 [1a.]
Act XVI of 1889 (Central Provinces Land Revenue)	...	In Urdu	...	0	1	6 [1a.]
	...	In Nagri	...	0	1	6 [1a.]
Act XX of 1889 (Lunatic Asylums Amendment)	...	In Urdu	...	0	3	0 [1a.]
Act I of 1890 (Revenue Recovery)	...	In Urdu	...	0	3	0 [1a.]
Act II of 1890 (Amending Acts XVIII of 1884, X of 1885, II of 1874 and V of 1881)	...	In Urdu	...	0	3	0 [1a.]
Act V of 1890 (Indian Forest and Burma Forest Amendment)	...	In Urdu	...	0	0	6 [1a.]
Act VI of 1890 (Charitable Endowments)	...	In Urdu	...	0	0	6 [1a.]
Act VIII of 1890 (Guardians and Wards)	...	In Urdu	...	0	2	3 [1a. 9p.]
Act IX of 1890 (Railways), as modified up to 1st June, 1905	...	In Urdu	...	0	8	0 [2a.]
Act IX of 1890 (Railways), as modified up to 1st May, 1896	...	In Nagri	...	0	8	0 [2a.]
Act X of 1890 (Press and Registration of Books Amendment)	...	In Urdu	...	0	0	3 [1a.]
Act XI of 1890 (Prevention of Cruelty to Animals)	...	In Urdu	...	0	0	3 [1a.]

				Rs.	A.	P.
Act XVIII of 1890 (Emigration Amendment)	...	...	In Urdu	...	0 0 3	[1a.]
Act XIX of 1890 (Salt Amendment)	...	...	In Urdu	...	0 0 3	[1a.]
Act XX of 1890 (North-Western Provinces and Oudh)	...	...	In Urdu	...	0 1 0	[1a.]
Act V of 1891 (Ports Act Amendment)	...	...	In Urdu	...	0 0 3	[1a.]
Act X of 1891 (Indian Criminal Law Amendment)	...	...	In Urdu	...	0 0 3	[1a.]
Act XIV of 1891 (Oudh Courts)	...	...	In Urdu	...	0 0 6	[1a.]
Act XVIII of 1891 (Bankers' Books Evidence), as modified by Acts 1 of 1893 and XII of 1900	...	...	In Urdu In Nagri	...	0 0 3 0 0 6	[1a.] [1a.]
Act II of 1892 (Christian Marriage Validation)	...	...	In Urdu	...	0 0 3	[1a.]
Act IV of 1892 (Bengal Court of Wards Amendment)	...	...	In Urdu	...	0 0 6	[1a.]
Act VI of 1892 (Limitation Act and Civil Procedure Code Amendment)	...	...	In Urdu	...	0 0 3	[1a.]
Act IV of 1893 (Partition)	...	...	In Urdu	...	0 0 3	[1a.]
Act I of 1894 (Land Acquisition)	...	...	In Urdu In Nagri	...	0 2 3 0 1 d	[1a. Op.] [1a. Op.]
Act III of 1894 (Criminal Procedure and Penal Code Amendment)	...	...	In Urdu	...	0 0 3	[1a.]
Act V of 1894 (Civil Procedure Code Amendment)	...	...	In Urdu In Nagri	...	0 0 3 0 0 3	[1a.] [1a.]
Act VIII of 1894 (Tariff), as modified up to 1st October, 1903	...	...	In Urdu In Nagri	...	0 4 0 0 3 9	[1a.] [2a.]
Act IX of 1894 (Prisons)	...	...	In Urdu In Nagri	...	0 1 3 0 2 3	[1a.] [1a.]
Act VII of 1895 (Civil Procedure Code and Laws Act Amendment)	...	...	In Urdu In Nagri	...	0 0 3 0 0 3	[1a.] [1a.]
Act XII of 1895 (Companies—Memorandum of Association)	...	...	In Urdu	...	0 3 0	[1a.]
Act XIV of 1895 (Pilgrim Ships)	...	...	In Urdu	...	0 1 3	[1a.]
Act II of 1896 (Cotton-duties)	...	...	In Urdu In Nagri	...	0 1 3 0 1 0	[1a.] [1a.]
Act VI of 1896 (Indian Penal Code Amendment)	...	...	In Urdu	...	0 0 3	[1a.]
Act VIII of 1896 (Inland Bonded Ware-houses)	...	...	In Urdu In Nagri	...	0 0 3 0 0 3	[1a.] [1a.]
Act XII of 1896 (Excise), as modified up to 1st August, 1905	...	...	In Nagri	...	0 3 3	[1a.]
Act I of 1897 (Act XXXVII of 1850 Amendment)	...	...	In Urdu In Nagri	...	0 0 3 0 0 3	[1a.] [1a.]
Act II of 1897 (Criminal Tribes Act Amendment)	...	...	In Urdu	...	0 0 3	[1a.]
Act III of 1897 (Epidemic Diseases)	...	...	In Urdu In Nagri	...	0 0 3 0 0 3	[1a.] [1a.]
Act IV of 1897 (Fisheries)	...	...	In Urdu In Nagri	...	0 0 3 0 0 3	[1a.] [1a.]
Act IV of 1897 (Negotiable Instruments Act Amendment)	...	...	In Urdu In Nagri	...	0 0 3 0 0 3	[1a.] [1a.]

				Rs.	A.	P.
Act VII of 1897 (Indian Emigration Act (In Urdu Amendment))	{ In Urdu	...	0 0 3	[1a.]		
	{ In Nagri	...	0 0 9	[1a.]		
Act VII of 1897 (Reformatory Schools) ...	{ In Urdu	...	0 0 3	[1a.]		
	{ In Nagri	...	0 0 9	[1a.]		
Act IX of 1897 (Provident Fund), as modified (In Urdu up to 1st April, 1903)	{ In Urdu	...	0 0 0	[1a.]		
	{ In Nagri	...	0 0 9	[1a.]		
Act X of 1897 (General Clauses) ...	{ In Urdu	...	0 1 0	[1a.]		
	{ In Nagri	...	0 1 0	[1a.]		
Act XII of 1897 (Local Authorities Emer- (In Urdu gency Loans))	{ In Urdu	...	0 0 3	[1a.]		
	{ In Nagri	...	0 0 3	[1a.]		
Act XV of 1897 (Cantonments) ..	In Urdu	...	0 0 3	[1a.]		
Act I of 1898 (Stage Carriages Act [1861] (In Urdu Amendment))	{ In Urdu	...	0 0 3	[1a.]		
	{ In Nagri	...	0 0 3	[1a.]		
Act III of 1898 (Lepers) ...	{ In Urdu	...	0 0 6	[1a.]		
	{ In Nagri	...	0 0 6	[1a.]		
Act IV of 1898 (Indian Penal Code Amend- ment)	In Urdu	...	0 0 3	[1a.]		
Act V of 1898 (Code of Criminal Procedure), (In Urdu as modified up to 1st April, 1900)	{ In Urdu	...	1 4 0	[8a.]		
	{ In Nagri	...	1 0 0	[8a.]		
Act VI of 1898 (Post Office) ...	{ In Urdu	...	0 2 0	[1a.]		
	{ In Nagri	...	0 2 0	[1a.]		
Act IX of 1899 (Live-Stock Importation) ...	{ In Urdu	...	0 0 3	[1a.]		
	{ In Nagri	...	0 0 3	[1a.]		
Act X of 1899 (Indian Insolvency Rules) ...	In Urdu	...	0 0 3	[1a.]		
Act I of 1899 (Indian Marine Act (1887) Amendment)	{ In Urdu	...	0 0 0	[1a.]		
	{ In Nagri	...	0 0 0	[1a.]		
Act II of 1899 (Stamp), as modified up to (In Urdu 31st August, 1905)	{ In Urdu	...	0 7 0	[1a.]		
	{ In Nagri	...	0 7 6	[1a.]		
Act III of 1899 (Prisoners), as modified (In Urdu up to 1st March, 1905)	{ In Urdu	...	0 2 3	[1a.]		
	{ In Nagri	...	0 2 3	[1a.]		
Act VI of 1899 (Government Buildings) ...	{ In Urdu	...	0 0 3	[1a.]		
	{ In Nagri	...	0 0 3	[1a.]		
Act VII of 1899 (Indian Steam-vessels Act (In Urdu (1884) Amendment))	{ In Urdu	...	0 0 3	[1a.]		
	{ In Nagri	...	0 0 3	[1a.]		
Act VIII of 1899 (Patroleum) ...	{ In Urdu	...	0 0 0	[1a.]		
	{ In Nagri	...	0 0 0	[1a.]		
Act XI of 1899 (Arbitration) ...	{ In Urdu	...	0 0 9	[1a.]		
	{ In Nagri	...	0 0 9	[1a.]		
Act XI of 1899 (Court-fees Amendment) ...	{ In Urdu	...	0 0 9	[1a.]		
	{ In Nagri	...	0 0 6	[1a.]		
Act XII of 1899 (Currency Notes Forgery), (In Urdu)	{ In Urdu	...	0 0 3	[1a.]		
	{ In Nagri	...	0 0 3	[1a.]		
Act XVI of 1899 (Tariff Amendment) ...	{ In Urdu	...	0 0 3	[1a.]		
	{ In Nagri	...	0 0 3	[1a.]		
Act XVII of 1899 (Indian Registration (In Urdu Amendment))	{ In Urdu	...	0 0 3	[1a.]		
	{ In Nagri	...	0 0 3	[1a.]		
Act XVIII of 1899 (Land Improvement Loans (In Urdu Amendment))	{ In Urdu	...	0 0 3	[1a.]		
	{ In Nagri	...	0 0 3	[1a.]		
Act XX of 1899 (Presidency Banks) ...	{ In Urdu	...	0 0 3	[1a.]		
	{ In Nagri	...	0 0 3	[1a.]		
Act XXI of 1899 (Central Provinces Tenancy (In Urdu Amendment))	{ In Urdu	...	0 0 3	[1a.]		
	{ In Nagri	...	0 0 3	[1a.]		

Dr. A. E.

Table showing effect of legislation in the Governor-General's							
General during 1854 to 1905	1	0	0 [1a. 6p.]
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Date	date	during 1902	0	2	6 [1a.]
Date	date	during 1903	0	14	0 [2a.]
Date	date	during 1904	0	4	0 [2a.]
Date	date	during 1905	0	0	3 [1a.]
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...	1	8	0 [2a. 6p.]
Addenda and Corrigenda List No. 1 of 1905 to the above							
...	0	2	6 [1a.]
Index to Act V of 1859 (Indian Articles of War) as modified up to 1st January, 1895							
...	0	7	0 [2a.]
Ditto	DittoIn Urdu and Nagri	0	7	0 [2a.]
...In Urdu and Nagri	0	1	9 [1a.]
Contents to ditto	0	2	0 [1a. 6p.]
The Baluchistan Agency Forest Law 1890In Urdu	0	3	3 [1a. 6p.]
...In Urdu
The Quetta Municipal Law 1895
The Baluchistan Agency Criminal Justice Law, 1895In Urdu	0	0	9 [1a.]
...	0	2	6 [1a.]
The Baluchistan Agency Civil Justice Law, 1895 In Urdu							

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property governed by the ordinary Hindu law of the Mitakshara School, the defence was that a custom of lineal primogeniture prevailed in the family by which from a period prior to British rule the estate had always descended to the eldest son, the junior members of the family being entitled only to maintenance, and not to any share of the land. The only reliable evidence of the status

proved, but the High Court reversed that decision being of opinion that the evidence was sufficient to establish the custom:—*Held* by the Judicial Committee reversing the decision of the High Court, that the evidence fell far short of establishing the custom during the period of native rule. From the documents produced, it appeared that the grant of the office of Chowdhuri was one of an office only; that the office was revocable at the pleasure of the sovereign, and though generally heritable it might be conferred by him not merely on the

evidence showed that whenever the holder of the estate died leaving more than one son, the right of the eldest son was challenged in the Courts and the litigation invariably ended in a compromise under which the younger sons obtained a share of the estate very much in excess of the maintenance to which, had the custom existed, they would have been entitled. The evidence, therefore, entirely failed to give to the alleged custom the character of certainty which was essential to its validity.

RAMAKANTA DAS MOHAPATRA v. SHAMANAND DAS MOHAPATRA
(1909) I. L. R. 36 Calc. 590

INDEPENDENT ADVICE: *See* ATTORNEY AND CLIENT 403

INLAND NAVIGATION: *See* MARINE INSURANCE 516

INSOLVENCY—*Indian Insolvent Act (11 and 12 Vict., c. 21), s. 73—Practice—Appeal by petition—Petition by creditor not included in Schedule—Jurisdiction of High Court in its Appellate Jurisdiction—Distribution of Dividends.* On an application for relief under section 73 of the Insolvent Act, to the High Court in its appellate jurisdiction by a creditor, whose claim at the time of the final discharge was by some inadvertence not entered in the schedule, the insolvent, however, having notice of and acknowledging the claim and knowing of the omission:—*Held*, that the High Court, in its appellate jurisdiction, had jurisdiction to intervene, and to order that the creditor be entered in the insolvent's schedule, and that he do rank as creditor, as well in respect of past as of future dividends

In re H. R. COBBOLD, AN INSOLVENT (1909) I. L. R. 36 Calc. 512

INSOLVENT ACT (11 AND 12 VICT. C. 21), s. 73. *See* INSOLVENCY 512

JURISDICTION OF THE HIGH COURT IN ITS APPELLATE JURISDICTION: *See* INSOLVENCY 512

LEGISLATURE, POWERS OF. *See* LIMITATION ACT, SCH. II, ART. 180 543

LIMITATION ACT (XV OF 1877), s. 25: *See* MARINE INSURANCE 516

LIMITATION ACT (XV OF 1877), SCH. II, ART. 180—"Revivor of judgment," meaning and effect of—*Scire facias*, analysis of—*Legislature*,

application for s.
 necessary—Two Codes, not to use
 Procedure Code (V of 1908), s. 48. When the Legislature
 "revivor of judgment" in the Limitation Acts of 1871 and 1877, they
 had in view the procedure embodied in s. 216 of the Code of Civil
 Procedure of 1859 and s. 248 of the Code of 1877 and also the proceed-
 ings to revive then current in the Supreme Court, which were closely
 analogous to the (English) Common Law Procedure Act of 1852.
Seve Jacias analyzed and its history traced. There is the same pro-
 vision for revivor of judgments under the present law as there was
 under the old Statutes of Limitation. *Tincourie Dawn v. Debendro*
Nath Mookerjee, I. L. R. 17 Calc. 491, dissented from. *Ashootosh Dutt*
v. Doorga Churn Chatterji, I. L. R. 6 Calc. 504, followed. *Monohar*
Das v. Futeh Chand, I. L. R. 39 Calc. 979, explained and distinguished.
 The balance of authority preponderates largely in favour of the view
 that the Statute of Limitation to which a judgment is subject ceases
 to run upon a revivor of the judgment, where the matter is not gov-
 erned by Statute. The English case-law on the point dealt with. It
 is a well-settled principle of construction that the Legislature is pre-
 sumed to know not only the general principles of law but the construc-
 tion which the Courts have put upon particular Statutes. English
 and American leading cases cited. The principle of construction above
 enunciated is based on the ground that, as Legislature knows what
 the law is and has the power to alter it, any mistake on the part of
 the Judges may at once be corrected, and the absence of any such cor-
 rection, especially during a long period of time, indicates that the
 Courts have rightly ascertained the intention of the Legislature.
Phelan v. Johnson, 7 Ir. L. R. 535, followed. Section 230 of the Code
 of Civil Procedure, 1882, ought not to be so construed as to make it
 conflict with the provisions of Art. 180 of the Limitation Act of 1877.
Mayabhai Prembhai v. Tribhuvandas Jagjitandas, I. L. R. 6 Bom.
 258, *Ganapathi v. Balasundara*, I. L. R. 7 Mad. 549, and *Futeh*
Norain Chowdhry v. Chundrabati Chowdhraji, I. L. R. 20 Calc. 551,
 followed. Code of Civil Procedure of 1908, s. 48, noticed in this con-
 nection. It is not necessary for the remaining decree-holders to
 make a formal application for substitution of a deceased decree-
 holder. Section 234 of the Code merely requires that the legal repre-
 sentative should apply for execution of the decree and that his name
 should be brought on the record. *Syed Nadir Hossein v. Baboo*
Pearoo Thovildarince, 19 W. R. 255, and *Balkishoon v. Mohammed*
Tamam Allee, 4 All. H. C. 90, referred to

JOGENDRA CHANDRA ROY v. SHYAM DAS (1909) I. L. R. 36 Calc. 543

LUNAR MONTH: See MARINE INSURANCE 516

MARINE INSURANCE—Inland Navigation—Construction of Policy—War-
 ranty—Condition precedent—Impossibility of Performance—Exception
 from Risk—Onus probandi—Waiver—"Month," meaning of, in a con-
 tract—"Lunar Month"—General Clauses Act (X of 1897), s. 3, (33)—
 Limitation Act (XV of 1877), s. 25. A policy of insurance covering
 a cargo of jute on the voyage from Ghior to Calcutta against the
 adventures and perils of rivers and inland navigation including fire
 risk, contained, *inter alia*, the following conditions and warranties:—
 "It is further warranted:—2. That the risk of loss or damage by
 fire is not insured hereby unless expressly so stated in writing hereon,
 in which case such fire risk shall be subject to the following additional
 conditions:—(a) Any loss occasioned by smoking or cooking having
 been carried on in the said boat shall not be recoverable hereunder.
 3. That no smoking nor cooking shall be carried on in the said
 boat, but in a dargah provided for the purpose. 4. That in the
 event of loss:—(a) The Manji or Charandar must report to

the nearest Police Station within 24 hours and must state that the cargo is insured. (f) It is furthermore hereby expressly provided, that no suit or action of any kind against the said Company for the recovery of any claim upon, under or by virtue of this policy, shall be sustainable in any Court of law or equity unless such suit or action shall be commenced within the term of six months next after any loss or damage shall occur, and in case any such suit or action shall be

"warranty" as used in a policy of Marine Insurance is used to denote two different kinds of conditions: (i) a condition to be performed by the assured, and (ii) an exception from or limitation on the general words of the policy. In the first case the warranty is a condition precedent to the policy, whether it be precedent to the effectual making of the policy, or precedent to the accrual of the right to sue thereon, or whether it declares the events in which forfeiture ensues, or deals with the mode of settling disputes, or limits the period for bringing a claim; in all such cases, whether the conditions be material to the risk or not, they must unless waived be fulfilled with the most scrupulous exactness; and if not so fulfilled, there is a breach of an express stipulation which is one of the essential terms of the contract and the insurer is discharged from liability as from the date of the breach of warranty. the assured must prove that he has complied with all such warranties as being conditions precedent to the policy attaching, or that the performance thereof has been effectually waived. *Pavson v. Walton*, 2 Cowp 785, *Thomson v. Weems*, L. R. 9 App. Cas 671, *Barnard v. Faber*, [1893] L. Q. B. 340, referred to. The warranty in clause 2 (a) was an exception from the risk which the insurers were willing to undertake, and under it the onus of proving that the cargo was destroyed by fire, caused by cooking or smoking, would lie on them. *Hoyd v. Dubou*, 3 Camp 133, referred to. Clause 8 was a condition precedent to the liability of the insurers under the policy, and the onus of proving compliance was on the assured. Clause 9 (a) was similarly a condition precedent; the fact that the condition might be impossible of fulfilment could not affect the liability. *Worsley v. Wood*, 6 T R 710, and *Law v. George Neumes*, 31 Sc. L. R. 888, referred to. Notwithstanding the provisions of the General Clause Act and the Indian Limitation Act the

Clause 9 (f) was a condition precedent and had not been complied with. *See also*: even if the term "month" in the policy meant "calendar month," the plaintiff was out of time. *Edwards v. Bartholomew*, [1892] 1 Q. B. 161, referred to.

SOUTH BRITISH FIRE AND MARINE INSURANCE CO. v. DROO
NATH SHARMA (1899) 1 L. R. 36 Cal

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<i>additi</i>	
<i> v. Nga Kaung, U. B. R. 31; 2 Cr. L. J. Ind. 463, dissented from. The requiring a surety to such a bond is not to ensure the recovery of the object of amount of the bond from the principal, but to serve as an additional security for his keeping the peace. Queen-Empress v. Rahim Bakhsh, I. L. R. 20 All. 206, referred to.</i>	
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WITNESS— <i>Statement of witness taken by the police during investigation and recorded in the Special Diary—Copies of such statements when to be given to the accused—Criminal Procedure Code (Act V of 1898), ss. 161 and 162—Practice. Where the trying Magistrate, at the instance of the accused, called for the statements of certain prosecution</i>	
<i>ments recorded by the police and, if he found anything to their advantage to the accused, that he should also summon the witnesses who made them and allow cross-examination after supplying the accused with a copy of their statements.</i>	
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"CHOWDHURI": <i>See</i> HINDU LAW	590
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"MONTH": <i>See</i> MARINE INSURANCE	516
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"REVIVOR OF JUDGMENT": <i>See</i> LIMITATION ACT, SCH. II, ART. 180	543

Act which enable the Court sitting in Insolvency on a summary proceeding like the present to make virtually an ejectment decree, at the instance of a landlord, against his tenant. The appeal therefore succeeds and must be allowed with costs both here and in the Court of first instance. The order for committal must also be discharged. I regret the result, because I think the appellant has been too smart for the other side.

BRETT J. I agree.

Appeal allowed.

Attorney for the appellant : *N. B. Sarkar*

Attorney for the respondent : *P. L. De.*

J. C.

APPELLATE CIVIL.

Before Mr. Justice Coxe and Mr. Justice Doss.

SHAMALDHONE DUTT

v.

LAKSHIMANI DEBI.*

1908

Aug. 7.

Attorney and Client—Settled Account, re-opening of—Accounts settled on basis of Untaxed Bills—Fiduciary Relationship—Onus of Proof in Transactions between Attorney and Client—Independent Advice—Assignment of Promissory Notes, validity of—"Final decree," meaning of—Contract Act (IX of 1872), s. 16—Evidence Act (I of 1872), s. 111.

Where the plaintiff, a solicitor, had acted for the predecessor in title of defendants in various matters and had also from time to time advanced money to him and also received various sums on behalf of the plaintiff, and subsequently an account was settled on untaxed bills between the plaintiff and the said predecessor of the defendants, in which an independent solicitor acted for the same, and, as a result, at first a mortgage and then three further charges were executed in favour of the plaintiff, in a suit to recover the money due on these securities:—

Held, first, that the mere existence of fiduciary relationship between attorney and client will not entitle the client to have a settled account, concluded by

* Appeal from Original Decree, No. 229 of 1907, against the decree of Ambikacharan Mukerjee, Offg. Additional Subordinate Judge of Hooghly, dated March 29, 1907.

1908

SHAMAL
DHONE
DUTT
v.LAKSHIMANI
DEBI

mortgage, re-opened unless *sufficient cause* be shown, i.e., a *prima facie* case is made out that the bills are extortionate, or at any rate incorrect.

Lawless v. Mansfield (1) explained. *Lambert v. Still* (2), *Morgan v. Higgins* (3) and *Blagrove v. Routh* (4) followed.

Secondly, that if an attorney advises his client to take independent advice and the client does so, it is not the business of the attorney to see that the new attorney is doing his duty diligently.

Thirdly, that section 16 of the Contract Act taken with section 11 of the Evidence Act does not make it incumbent upon the attorney that, in order to prove his good faith, he must prove that all the accounts on which the settled account is based are correct.

Fourthly, that according to the practice prevailing in the Original Side of the High Court, taxation of bills of solicitors is optional, and bills are often adjusted without such taxation.

Monohur Doss v. Romanauth Law (5) distinguished.

Fifthly, if parties to a promissory note agree that, on the debtor executing a bond in favour of a third person, the creditor would cancel the promissory note, the arrangement would be a perfectly valid contract although a promissory note is a negotiable instrument.

Lastly, that where an order in precise terms orders accounts to be taken, it is a "decree."

Coverji Luddha v. Morarji Punia (6) not followed. *Rahimbhoy Habibbhoy v. Turner* (7) followed.

APPEAL by the plaintiff, Shamaldhone Dutt.

This was a suit to recover money due on an indenture of mortgage, dated the 6th October 1898, and on three indentures of further charge on the same properties, dated respectively the 4th April 1900, 11th May 1901 and the 3rd August 1903.

The plaintiff was the attorney, for a long series of years, of one Radhanath Mukherjee, deceased, whose widows are the defendants Nos. 1 and 2 in this suit and whose mother was the defendant No. 3. The mother died after written statement on her behalf was filed in the present suit.

In pursuance of an order of the High Court, Mr. R. Belchambers, who had been previously appointed Receiver of the immoveable properties allotted by a partition-decree of the High Court to the said Radhanath Mukherjee, together with

(1) (1841) 1 Dr. & War. 557.

58 R. R. 303.

(2) [1824] 1 Ch. 73.

(3) (1859) 1 Gilf. 270.

(4) (1856) 9 DeG. M. & G. 620.

(5) (1879) 1 L. R. 3 Calc. 473.

(6) (1895) 1 L. R. 9 Bom. 187

(7) (1890) 1 L. R. 15 Bom. 155;

L. R. 18 I A. 6.

Radhanath and his wife, executed in favour of the plaintiff the mortgage deed for Rs. 25,000 on the 6th October 1908 to meet debts and a decree in suit No. 227 of 1877 against the estate. Under another order of the High Court, passed in the same suit No. 227, the Receiver, with the other two, executed the indenture of the first further charge for Rs. 5,000 in favour of the plaintiff on the 4th April 1900. Under a subsequent order of the High Court, they executed on the 11th May 1901 the indenture of the second further charge for Rs. 7,500 in favour of the plaintiff. Later on, under an order of the High Court passed in the same suit No. 227, the Receiver when discharged placed Radhanath and his attorney, the plaintiff, in joint possession of some of the immoveable properties belonging to Radhanath and made over to Radhanath alone all the papers of the main estate and placed him in possession of all other moveables and immoveables. More than a year after this, Radhanath alone executed in favour of the plaintiff the indenture of the third further charge for Rs. 21,000 on the 3rd August 1903. The consideration for the last indenture was stated to be made up of interest on the mortgage and the following two charges, promissory notes executed from time to time by Radhanath in favour of the plaintiff and in favour of another, with interest and costs due to the plaintiff.

Defendant No. 2 really contested the suit, putting the plaintiff to the proof of all the material allegations of fact in the plaint and contending, *inter alia*, that inasmuch as the plaintiff's bills of costs were not taxed, as they ought to have been, under an order of the High Court, the plaintiff should not be allowed to recover the sum before taxation.

The Subordinate Judge uphold the contention of the defendants holding that the bill of costs should have been taxed, and that as it was not done, accounts of the third further charge should be re opened, the bills taxed and then a commissioner appointed to take accounts and a decree drawn up thereafter. The plaintiff thereupon applied for taxation, but the Taxing Officer declined to tax the bills after this long lapse of time. The plaintiff, therefore, preferred this appeal.

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Babu Harendra Narain Mitra (*Babu Tarhit Mohan Das* with him), for the respondents, raised a preliminary objection that no appeal lay as the decision of the Subordinate Judge was not a final adjudication, and it did not direct "accounts to be taken" in the technical sense of the words. The order was only interlocutory: *Coverji Luddha v. Morarji Punja* (1).

Babu Pravash Chandra Mitra (*Babu Hira Lal Sanyal* with him), for the appellant. The order is a final adjudication. It finally decided the dispute between the parties and set aside the third further charge and declared that it was not binding on the defendants. If a decree be passed on the basis of the taxed bills such a decree would not be a decree on the further charge in the suit, and so far as the validity of the final charge is concerned, the Court below has finally determined the same. I rely on *Rahimbhoy Habibbhoy v. Turner* (2), *Dulhin Golab Koer v. Radha Dulari Koer* (3) and *Jogodishury Debea v. Kailash Chundra Lahiry* (4). Further, the order of the Subordinate Judge was an order "directing accounts to be taken" and is a "decree" within the meaning of section 2 of the Civil Procedure Code.

The accounts of a solicitor cannot be re-opened unless some error or overcharge be proved. Mere general charges of undue influence will not justify a Court to re-open settled accounts, specially when such accounts are settled under independent advice. I rely on *Lambert v. Still* (5), *Lewes v. Morgan* (6), *Hickson v. Ayalward* (7) and *Mohesh Chandra Bosu v. Radha Kishore Bhattacharjee* (8). The circumstances of the case *Monohur Doss v. Romanauth Law* (9) were quite different. In the present case there was independent legal advice, large remissions were allowed, evidence of settlement of accounts

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has been clearly established, and there is positive evidence that there was no undue influence.

Babu Harendra Narain Mitra, for the respondent. As an attorney stands in a fiduciary relation to his clients, settled accounts between them can be re-opened without specific errors being alleged: *Lawless v. Mansfield* (1), *Leves v. Morgan* (2) and *Hickson v. Ayahward* (3) are distinguishable.

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Babu Pravas Chandra Mitra, in reply, referred to *Morgan v. Higgins* (11) and *Blagrave v. Routh* (12).

Cur. adv. vult.

COXE AND DOSS JJ. This was originally a case of considerable complexity, but for the purposes of this appeal the matters essentially in dispute may be stated at no great length.

The plaintiff, *Babu Shamaldhone Dutt*, was the attorney of one *Radhanath Mukherjee*, a gentleman, who apparently devoted much of his life to litigation. The indulgence of this

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(1) (1841) 1 Dr. & War. 557;
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(2) (1829) 3 Y. & J. 230.

(3) 3 MoL. (Lr.) 15.

(4) (1902) 1 L. L. R. 29 Calc. 595.

(5) (1865) 2 W. R. 307.

(6) (1906) 1 L. L. R. 33 Calc. 827.

(7) (1878) 1 L. L. R. 3 Calc. 473.

(8) (1901) 1 L. L. R. 24 Mad. 654.

(9) (1905) 1 L. L. R. 28 Mad. 544.

(10) (1907) 17 M. L. J. 393.

(11) (1859) 1 Gd. 270.

(12) (1856) 8 DeG. M. & G. 620; 26 L. J. Ch. 86.

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The plaintiff, *Babu Shamaldhone Dutt*, was the attorney of one *Radhanath Mukherjee*, a gentleman, who apparently devoted much of his life to litigation. The indulgence of this

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taste involved him in great expenditure, and the plaintiff advanced him considerable sums towards meeting it. For these advances, Radhanath Mukherjee executed at first a mortgage and then three further charges in favour of the plaintiff, and the plaintiff brings this suit to recover the money due on these securities. We are not concerned in this appeal with the original mortgage and the first two further charges.

The third charge was executed on the 3rd August 1903 for a consideration of Rs. 21,000 which, excluding fractions, was made up as follows :—

	Rs.
Interest on mortgage and previous two charges	6,468
Promissory notes executed by Radhanath for advances made by the plaintiff from time to time	14,870
Interest on the same... ..	1,451
Promissory notes executed by Radhanath in favour of Prakash Ghosh with interest	6,163
Costs due to plaintiff	13,593
Total	<u>42,545</u>
Deduct sum received by plaintiff from Radha Nath's estate	14,452
Remitted by plaintiff out of the sum of Rs. 13,593 above	<u>7,093</u>
	<u>21,545</u>
Balance ...	<u>21,000</u>

The Subordinate Judge with respect to the first item of Rs. 6,468 has left the calculation of the proper amount to be settled when accounts are taken. He is apparently satisfied of the liability of Radhanath on the hand notes, but with respect to the sum of Rs. 13,593 he has held on the authority of *Monohur Doss v. Romanauth Law* (1) that the plaintiff ought to have had his bills taxed, and that as he did not have them taxed

the accounts of the third further charge should be re-opened. Accordingly he directed that the accounts relating to the third further charge should be re-opened, that the plaintiff should get his bills taxed and then refile them in Court; that then a commissioner should be appointed to take accounts and thereafter that a decree should be drawn up under section 80 of the Transfer of Property Act.

The plaintiff then applied for the taxation of his bills. But we are told that after this lapse of time, the Taxing Officer declined to tax his bills without the orders of the Court. As the bills were old bills and related to several cases, the orders of the Court could not have been obtained without several applications, and as this would have cost money, and the result was doubtful, the plaintiff decided to present this appeal. The appellant takes objection to the finding of the Subordinate Judge on various questions of fact, but the main ground of the appeal is that the Court should not have ordered the accounts relating to the third charge to be re-opened.

A preliminary objection is taken that no appeal lies as the order of the Subordinate Judge does not amount to a decree as defined in the Civil Procedure Code. It is urged that all that the Subordinate Judge has done is to order the plaintiff to have his bills taxed and that the stage of directing accounts to be taken has not yet been reached, nor has any right claimed been as yet adjudicated upon, so far as the third charge is concerned. Reliance is placed on the decision in *Coverji Luddha v. Morarji Punja* (1). But if that case can still be regarded as a correct statement of the law after the decision in *Rahimbhoy Habibbhoy v. Turner* (2), it does not really help the respondent much. In that case the defendants were held liable to pay half of whatever sum the Government Surveyor might certify to be due for certain work. Further enquiries were made and a final decree was made later. The defendants appealed, and it was argued that the first order was a decree and that an appeal against it was barred by limitation. The Court held that it was not

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(1) (1885) I L. R. 9 Bom. 183.

(2) (1899) I L. R. 15 Bom. 155 ;
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an adjudication that decided the suit, and on the point whether it was an order directing accounts to be taken they observed :—
 “The words ‘directing accounts to be taken’ are precise and technical, and as the order does not fall within that description we must hold that it is not a decree.” The natural inference is that if the order had, in precise terms, ordered accounts to be taken, as is the case here, the Court would have regarded it as a decree. And clearly a Court would be disposed to construe the definition of a decree with extreme strictness far more in such a case, where if the order complained of was regarded as a decree, the appeal was barred by limitation, than in a case like the present, where the sole question is whether the appeal should be made now or a little later when some further orders, more or less of a formal character, have been made. It must be remembered that the plaintiff has endeavoured to carry out the orders of the Court, and that it is only when he has found that they cannot be carried out without expenso and risk that he has preferred this appeal.

The matter, however, may be put on a wider ground. The point on which this appeal almost exclusively turns is the question whether the accounts relating to the third charge should be re-opened. The third charge contains a formal covenant to pay Rs. 21,000, and the effect of the learned Subordinate Judge's decision is that the defendants are held not liable to perform this contract, as it stands, because the plaintiff being in a position of active confidence towards Radhanath Mukherjee has failed to prove that he exercised no undue influence. This seems to us a clear adjudication, deciding the suit so far as the third charge is concerned. The fact that the learned Subordinate Judge intends hereafter to adjust the equities arising out of the contract does not in any way do away with his adjudication that the contract, as it stands, is not binding on the defendants. We think therefore that the Subordinate Judge's order is a decree, and that the objection, that no appeal lies, must fail.

We turn now to the main point in dispute, namely, whether the defendants, who are the successors in interest of

Radhanāth Mukherjee, are entitled to have the accounts relating to the further charge re-opened, on the grounds that the plaintiff ought to have had his bills of costs taxed, and that, as he did not have them taxed, they must be further examined before they can be accepted as sufficient consideration for the mortgage.

Several English and Irish cases have been laid before us on this point. But in our opinion the authorities cited do not hear out the defendants' case. The contention of the defendants is that an attorney, being bound to have his bills taxed, is liable to have his bills re-examined, if he sues on a bond to pay a sum found on a settlement of untaxed bills to be due to him. Now, the decision in *In re Webb. Lambert v. Still* (1) is wholly against the contention, but the learned pleader for the respondent relies on *Lawless v. Mansfield* (2). That case certainly goes a great way in his favour, but it is not of so high an authority as the decision in *Lambert v. Still* (1), and even in *Lawless v. Mansfield* (2) all that was decided was that "where the relation of attorney and client subsists, in questions of accounts between the parties the common rule (that accounts will be re-opened only on errors being proved) does not prevail. Though the party only alleges generally that the accounts are erroneous, the Court will make a decree opening the accounts, if sufficient cause be shown." It is not laid down that the mere existence of the relation of attorney and client is sufficient, in the absence of all reasons for suspicion, to justify disregard of a formal contract and the re-examination of the accounts on which it is based. That the words "if sufficient cause be shown" are not mere surplusage was pointed out in *Morgan v. Higgins* (3) and in *Blagrove v. Routh* (4) it was held that what was said in *Lawless v. Mansfield* (2) was not meant to apply and could not apply to a mortgage for bills of costs only.

In our opinion, therefore, these cases do not justify us in holding, in the absence of evidence that there is anything open to suspicion in the third further charge that the plaintiff is

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(1) [1894] 1 Ch. 73.

(3) [1859] 1 Gd. 270.

(2) [1841] 1 Dr. & War. 557; 58 R. R. 303. (4) [1856] 5 De.G. M. & G. 620.

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bound to show that the bills, for the payment of which the bond in suit was in part given, were just and reasonable.

Passing from the consideration of these cases, which after all are a safe guide in this country only in so far as they are in accordance with the provisions of the Contract Act, we may add that nothing in the Contract Act requires the re-opening of the accounts. Section 18 only presumes undue influence by a person in a position to dominate the will of another, when the contract appears on the face of it to be unconscionable. Section 111 of the Evidence Act throws upon a person standing in a fiduciary relation to another the burden of proving that he acted in good faith. The expression "good faith" is not defined in the Evidence Act, but to prove the good faith of a contract it certainly is not necessary to prove that all the accounts on which the contract is based are correct.

The main-stay of the respondent's case on this point is the decision in *Monohur Dass v. Romanauth Law* (1) already cited. Under the rules of this Court on the Original Side (Belchambers 328) attorneys have to have their bills taxed every year, and if an attorney receives payment for untaxed costs he is liable to be struck off the rolls. To this rule, however, there is a note affixed that the rule has not been observed since 1862, that in all cases taxation is deemed to be optional, and bills of costs are not infrequently adjusted without taxation. In the case cited the attorney offered to have these bills taxed, but his client refused. His client had no independent legal advice and was the client of the attorney till the latter sued on the mortgage which the former had given him for the amount due on his bills of costs, and he had a case before the attorney as arbitrator. It was held that the client was entitled to have the bills re-opened and taxed. In the present case, however, the attorney had done a good deal more than offer to have his bills taxed. He had filed the bulk of them in the taxing office, and he swears that he pressed his client during the considerable period that they lay in that office to have them examined. As he had paid the tax himself in advance, it is natural to suppose

that the delay in the examination of the bills was not due to him. Another point of difference between this case and that cited is that the client had independent legal advice, or at any rate the opportunity of getting it.

It appears to us that the defendants are bound to make out a *prima facie* case that the bills were extortionate, or at any rate incorrect, before they can ask the Court to re-examine them in a suit on a mortgage bond given for their discharge. We may say at the outset that they have failed in our opinion to make out any such case. The bills have been produced, but though the plaintiff has been subjected to a long and harassing cross-examination, not a question has been put to impugn the accuracy of the items in the bills. We might perhaps leave the matter there, but as it has been discussed at length we think that we should, in justice to the plaintiff, deal with the evidence on the other side, which in our opinion shows conclusively that the plaintiff took no advantage of Radhanath, but in fact treated him with liberality.

The negotiations which terminated in the third further charge began in April 1902. At that time Radhanath's property was in the hands of Mr. Belchambers, who had been appointed Receiver, as far back as 1895, in a suit brought by Raja Srinath Roy. The plaintiff swears that Radhanath at that time examined the accounts and the draft bills, the bulk of the original bills being in the taxing office, and agreed to pay Rs. 6,500 in full discharge of them, the sum of Rs. 7,093 being remitted by the plaintiff at the entreaty of Radhanath. This story is corroborated by the plaintiff's partner and by Satya Charan, Radhanath's mother's first cousin. This gentleman lives in a house of the plaintiff, and his independence is attacked. There is also a slight discrepancy as to whether the transaction was effected in the house or the office, but we attach no importance to it. It is probable that the business was not finished in a day and was discussed both at home and at office. If this evidence stood by itself we should consider it entitled to respect, even if it were not regarded as conclusive. The witnesses are respectable people, and their evidence stands wholly

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uncontradicted. But it does not stand by itself, but is, on the contrary, strongly corroborated by all the circumstances of the case. In the first place Radhanath was not the man to agree to pay Rs. 6,500 without good reason. An attempt has been made to represent him as incapable of business. But the evidence of Mr. Belchambers shows that he was a man of ordinary intelligence. He seems to have been always engaged in litigation. Priyanath, the principal witness for the defendants, says that he used not to listen to any one, and that though he took advice he did not act upon it. The description given of Radhanath by this witness suggests rather an obstinate, headstrong man, not prone to take advice and not likely to enter into agreements to pay large sums of money for the asking. Yet not only did he agree to the payment of Rs. 6,500 on account of these bills, but he repeated that agreement a year later, and during his life never showed any signs of desiring to rescind from it. The further charge was recognised in a written statement filed by him a year later, in June 1904, and interest was paid on it up to July 1904, a few months before his death. It is not improbable that if he had lived, this defence would never have been set up. The bulk of the bills, as we have said, had long been deposited in the taxing office, and the tax had been paid in advance. No reason for depositing them there can be assigned except that the plaintiff desired to have them taxed. This fact itself suggests that the bills were not extortionate, for if the total of a bill is reduced by a sixth by the Taxing Officer, the attorney has to pay the whole tax. Included in the accounts of the third charge are some taxed bills, and the largest of them was reduced by 10 per cent. only. This is an indication, so far as it goes, that the plaintiff's bills, at any rate those sent in to the Taxing Officer, were not extortionate.

There is also another circumstance in the plaintiff's favour. The settlement of accounts was in April 1902. In the following month the estate of Radhanath was released from the charge of the Receiver, and handed over to the joint management of Radhanath and the plaintiff. The plaintiff was in

sole charge of the receipts and expenditure, paying Radhanath a fixed monthly allowance. This arrangement was of course favourable to the plaintiff, and it may reasonably be inferred that he and Radhanath had arranged together for the payment of Raja Srinath Roy, and the transfer of the estate from the Receiver to their hands. All this must have taken some time. It seems very unlikely that the plaintiff would have selected this occasion of all others to try to obtain Radhanath's assent to pay off his dues, if those dues were really extortionate. Radhanath might easily have discovered the fact, if really he was being cheated, and in that case the plaintiff's chances of obtaining with his aid joint possession of the property as security for his advances would have been seriously jeopardised. He had every reason at that time to keep Radhanath in good humour, an object which an untimely insistence or an extortionate bill would probably have frustrated. All these circumstances indicate that the bills were reasonable. No doubt if they had been taxed the sum of Rs. 13,593 would have been reduced probably by a sum between one and two thousands. But we have no doubt that Radhanath was greatly benefited by this agreement to pay only Rs. 6,500.

This suit, however, is not based on the promissory note for Rs. 6,500 which Radhanath executed in April 1902, but on the further charge which was executed 1½ years later. If really the promissory note was extortionate, it is difficult to believe that Radhanath would not have discovered the fact by July 1903. The conduct of the plaintiff at the time that the further charge was executed completely exonerates him in our opinion from any suspicion of bad faith. He advised Radhanath to consult another attorney and accordingly Radhanath went to Mr. J. C. Dutt. Mr. Dutt examined the draft, suggested alterations and examined the zemindari accounts. As to whether he examined the plaintiff's bills of costs, there is some conflict of evidence. Mr. Dutt says that he did so, while the plaintiff and his partner say distinctly that Mr. Dutt did not examine the bill. But it is possible that they may not have known the

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facts. The bills, if they were examined at all by Mr. Dutt, were examined by him at his own office and were brought to him by Radhanath. Radhanath may well have had some diffidence in re-examining bills which he had agreed to pay a year before and may have obtained them surreptitiously from the plaintiff's office. This is of course a mere conjecture, but some such conjecture is necessary to explain the facts. Not only does Mr. Dutt swear that he examined the bills, but it appears that this matter of Radhanath's liability for Rs. 6,500 on account of these bills was entered in the draft by Mr. Dutt himself, and it is difficult to see where he obtained this information if he was not consulted on this very point by Radhanath. The plaintiff evidently did not suggest the inclusion of this liability in the further charge.

Finally, it is not suggested that Mr. Dutt is in collusion with the plaintiff. There is nothing to rebut the plaintiff's statement that he did not advise Radhanath to consult any particular attorney. Radhanath apparently went to Mr. Dutt of his accord and consulted him. Even assuming that Mr. Dutt did not examine the bills there is nothing to show that the bills were withheld from him, or that he would not have been given full opportunities for examining them if he or Radhanath had asked to see them. In these circumstances, even if Mr. Dutt did not examine the bills, the fact is of no importance. An attorney may be bound in certain circumstances to advise his client to take independent advice. But when he has done so more cannot be required of him. It is not his business to see that the attorney selected by his client fulfils his duties to his client and is guilty of no remissness or negligence. If he sends his client to another attorney and is ready to comply with all reasonable demands for information, he cannot be expected to do more or to be responsible for another's omissions.

With regard to this question of the costs due to the plaintiff, it is urged that, though he received Rs. 7,100 from the Manager of the Jumsi Estate as costs, he credited Radhanath with only Rs. 4,860. To this it is replied that the sum of Rs. 4,860 was

paid by the Receiver in advance, and when it was recovered from the Junsí Estate the sum was credited to Radhanath. The rest was due to the plaintiff as costs between party and party incurred after December 1001, and therefore had nothing to do with the account of the sum of Rs. 6,500 which related to costs between attorney and client incurred up to December 1901. The materials on the record do not justify any clear finding on this point, and therefore do not justify the re-opening of the account of the plaintiff's bills of costs.

We have no doubt that Radhanath was greatly benefited by the plaintiff's acceptance of Rs. 6,500 in full discharge of his bills of costs. We think that before the further charge, on which this suit was based, Radhanath had a full opportunity of taking legal advice on his liabilities, of which he availed himself as far as he and his adviser thought necessary. The case is therefore quite distinguishable from *Menohur Doss v. Romanauth Law* (1) which decision indeed proceeded on the special circumstances of the case rather than laid down any general principle of law. Taking this view, we find that the defendants are not entitled to have the accounts relating to the third further charge re-opened on the ground that the plaintiff's bills of costs were not taxed.

This is by far the most important point in the case and it is not necessary to discuss the other points at much length. The other items of the accounts are attacked in cross-appeal. With respect to the sum of Rs. 6,465 on account of interest on the former charges, it is said that if the payments of interest made by the Receiver had been credited on the days of payment, the sum due on this account would have been much less. On the other hand it is said that, as the mortgage and charges provided for the payment at certain rests, it was right to credit the money on the date of the rests and not on the days of payment. The matter has not been discussed by the Subordinate Judge. No account showing how interest has been overcharged, has been laid before us by the learned pleader for the respondents, and all that we need say on the matter is

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that we have been given no satisfactory reason for re-opening the account of interest given in the further charge.

As regards the sum of Rs. 14,870, it is urged that there is no proof of the appropriation of the money advanced on the hand-notes to the repairs of the embankment or to the payment of the rent. But most of these notes were executed before the estate was released from the control of the Receiver. The largest sum, namely, Rs. 6,100 was advanced in January 1903, after the estate had been released, but this was paid to satisfy the decree of Harendra Lal Roy, under which the property of Radhanath had been attached. We are informed that this was the property in suit, but the fact that this point has not been fought out in the trial of the case indicates that the opposition to these hand-notes is hopeless. The next largest sum, viz., Rs. 4,100 was advanced while the estate was still in the Receiver's hands and is credited in the Receiver's book.

With respect to the payment of Rs. 6,163 on account of hand-notes executed by Radhanath in favour of Prakash Ghose, the plaintiff's grandson, it is urged that the hand-notes were not really paid off, and that as they were not endorsed by Prakash Ghose in favour of the plaintiff, the payment is not a valid consideration for the mortgage. The first point seems to us of no importance, even if we saw any reason for doubting the un rebutted evidence of the plaintiff and his grandson that the notes were paid off. It is perfectly clear that the money was due and that the parties met to arrange about its payment. If Prakash Ghose told Radhanath that on his executing the mortgage in favour of the plaintiff he (Prakash Ghose) would cancel the hand-notes and Radhanath agreed to this arrangement that would be a perfectly valid contract whether any money changed hands or not. As to the second point, it does not arise at all. It has been pointed out that an assignment of a negotiable instrument can only be effected by endorsement. But here notwithstanding an inaccurate remark in the further charge, there was never any question of an assignment at all. The parties did not wish to negotiate the note, but to put an end to it; and to say that a negotiable instrument

can only be put at and to by endorsement, is obviously incorrect.

Another objection raised is that the plaintiff had no right under the order of this Court of the 22nd May 1902, to devote a portion of the sum of Rs. 14,452 in his hands to the payment of his bills for Rs. 6,600, as that order authorised the plaintiff to manage the property with Radhanath and to apply the balance of the income after the charges had been paid to the payment of his incumbrances. But, in the first place, the order was an enabling order. It authorizes the plaintiff to apply the balance to his incumbrances, but it did not render it obligatory on him to do so. Secondly, it is clear that there was no real balance at all, and consequently no portion of the balance was applied to the payment of the plaintiff's bills. The plaintiff had advanced at least Rs. 14,870, a sum in excess of the amount of Rs. 14,452 in his hands, towards the expenses of the estate, and had no balance over to apply to his mortgage.

We think, therefore, that all the grounds put forward for re-opening the accounts relating to the further charge fail. The result is that an account will be taken of what will be due to the plaintiff or account of the mortgage and three further charges with interest and costs of both Courts on the 7th February 1909. If the defendants fail to pay this sum on or before that date, the plaintiff will be entitled to sell the property hypothecated to him in the usual way.

The decretal amount will bear interest at the rate of 6 per cent. after the said date.

The cross-appeal will be dismissed with costs.

Appeal allowed.

APPELLATE CIVIL.

Before Mr. Justice Mitra and Mr. Justice Chitty.

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Nov. 13.

MATHURA NATH ROY CHAUDHURI

v.

BASANTA KUMAR CHAKRAVARTI.*

Appeal—Bengal Tenancy Act (VIII of 1885), ss. 106, 109A—Civil Procedure Code (Act XIV of 1882), ss. 558, 560—Appeal from Order under s. 106 of the Bengal Tenancy Act, if lies to High Court.

Section 588 of the Code of Civil Procedure does not apply to orders under s. 106 of the Bengal Tenancy Act.

Held, further, that s. 109A, sub-section (3) of the Bengal Tenancy Act limits the power of the High Court to the hearing of second appeals and not appeals from orders either under s. 558 or s. 560 of the Code of Civil Procedure.

Mothur Chandra Majumdar v. Tara Sunlar Ghose (1) relied on.

APPEAL by the petitioners, Mathuranath Roy Chaudhuri and others, for revival of appeal in the lower Court.

An appeal under section 109A of the Bengal Tenancy Act was filed in the Court of the District Judge of Backerganj on the 31st January 1907. The hearing of the appeal was fixed for the 18th April. On that date the appeal was not heard for want of time and the Court fixed the 3rd May for hearing of the appeal. The appeal was dismissed on the latter date in default of the appellants. A petition for revival of the appeal was filed on the 9th May and was rejected on the following day. The appellants, thereupon, filed this appeal against the order dismissing the application.

Babu Gunada Charan Sen, for the respondents, took a preliminary objection to the hearing of the appeal contending that section 588, C. P. C., did not contemplate appeals in such cases.

* Appeal from Order, No. 325 of 1907, against the order of J. D. Cargill, District Judge of Backerganj, dated May 10, 1907.

(1) (1903) 7 C. W. N. 440

Babu Janaki Nath Pal, for the appellants. The recent case of *Hare Krishna Mahanti v. Bhusan Chandra Mahanti* (1) is in my favour.

[MITRA J. The case you cito is inapplicable. It was a case under the old Act.]

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MITRA AND CHITTY JJ. A preliminary objection has been taken to the hearing of this appeal on the ground that section 588, Code of Civil Procedure, does not apply to proceedings under section 106 of the Bengal Tenancy Act. Section 109(A), sub-section 3, confines the power of the High Court to the hearing of second appeals and not appeals from orders, either under section 558 or section 560. In *Mothur Chandra Majumdar v. Tara Sunkar Ghose* (2) this Court declined to allow an appeal from an order under section 562, Code of Civil Procedure, made by a special Judge exercising the powers given to him by section 109 (A). The same principle also applies to this case. We accordingly dismiss this appeal with costs.

Appeal dismissed.

S M.

(1) (1908) 12 C. W. N. 888.

(2) (1903) 7 C. W. N. 440.

APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Harington and Mr. Justice Brett.

*In re H. R. COBBOLD, AN INSOLVENT.**

1908

Nov. 23.

Insolvency—Indian Insolvent Act (11 and 12 Vict., c. 21), s. 73—Practice—Appeal by petition—Petition by creditor not included in schedule—Jurisdiction of High Court in its Appellate Jurisdiction—Distribution of Dividends.

On an application for relief under section 73 of the Insolvent Act, to the High Court in its appellate jurisdiction by a creditor, whose claim at the time of the final discharge was by some inadvertence not entered in the schedule, the insolvent, however, having notice of and acknowledging the claim and knowing of the omission:—

Held, that the High Court, in its appellate jurisdiction, had jurisdiction to intervene, and to order that the creditor be entered in the insolvent's schedule, and that he do rank as creditor, as well in respect of past as of future dividends.

INSOLVENCY.

THIS was an application to the Appeal Court, under section 73 of the Insolvent Act, made by the Milwaukee Bag Company whose name was not included in the insolvent's schedule of creditors, as a party "aggrieved" by the order of final discharge of the insolvent.

The Milwaukee Bag Company was an American Company carrying on business at Milwaukee in the United States of America.

On the 2nd April 1906, Henry Ralph Cobbold filed his petition in Insolvency, and thereupon a vesting order was made, directing that the estate and effects of the insolvent be vested in the Official Assignee. On the 4th September 1906, the insolvent filed his schedule of creditors omitting, however, the name of the Milwaukee Bag Company whose claim against the insolvent amounted to 39,292 dollars, the equivalent of over Rs. 1,22,000. On the 3rd February 1907,

* Appeal from Original Civil, No. 11 of 1908.

the insolvent was granted his personal discharge, and on the 7th February 1907, an order nisi was made for his final discharge.

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In May 1907, the American Company instructed a firm of solicitors in Calcutta, in connection with their claim, and subsequently forwarded to them an affidavit in proof of their claim. On the 3rd September 1907, the affidavit of claim was submitted to the Official Assignee who, however, replied that as the claim had not been entered in the insolvent's schedule an order of Court would be necessary to entitle the Company to rank as creditors. On the 5th September 1907, the affidavit of claim was forwarded by the solicitors of the creditor Company to the insolvent's solicitors. On the 9th January 1908, the latter replied that the insolvent had considered the claim and would admit it subject to the creditor Company undertaking to assent to his final discharge when the proper time came, and on the 23rd January 1908, they returned the affidavit of claim to the solicitors of the creditor Company. On the 28th February 1908, the Company's solicitors forwarded to the insolvent's solicitors for approval an engrossed form of petition for the amendment of the schedule of the insolvent by the inclusion of the Company's claim, so as to enable the Company to obtain the benefit of any dividend declared or to be declared by the Official Assignee out of the insolvent's estate.

On the 3rd March 1908, the insolvent through his solicitors applied for his final discharge and thereupon an order was passed by Fletcher J. making the order nisi absolute.

On the 11th March 1908, the insolvent's solicitors returned the petition of amendment of the creditor Company to the latter's solicitors with a letter in the following terms: "We find ourselves in a very awkward position, as before signing your petition we thought it necessary to send same to the Official Assignee for inspection and he did not return same until after final discharge had been applied for and granted, and he now says that it is too late to amend the schedule. We now return

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the petition signed and shall be glad to assist you in any way we can in getting the schedule amended."

Thereupon, the Milwaukee Bag Company made the present application, praying *inter alia*, (i) that the order of final discharge, dated the 3rd March 1908, may be cancelled and that the petition of the insolvent for final discharge may be returned to the Insolvent Court for re-hearing, (ii) that the Company may be entered in the insolvent's schedule as creditors to the amount of 39,292 dollars and rank as creditors for the purpose of receiving future dividends, (iii) that the Official Assignee may be directed out of moneys in his hands belonging to the insolvent's estate to pay to the Company past dividends upon their debt at the same rate as the dividends paid upon debts already proved before any further dividend is declared or paid.

Mr. Gregory (*Mr. Camell* with him), for the creditor Company. At the time of applying for and obtaining his final discharge, the insolvent had full notice of the Company's claim, and full knowledge that the Company had not been included in the schedule of creditors. The Company took all the steps necessary to have their claim included, and through some inadvertence this was not done. One of two courses was open to the creditor Company: to come in and prove their claim under section 41 of the Insolvent Act, or to appeal by petition under section 73, from the order of final discharge as "persons aggrieved." It is not desired to open up the insolvency proceedings by pressing for the cancellation of the order of final discharge, unless it be necessary. The creditor Company would be satisfied with an order in terms of prayers 2 and 3 of their petition.

Mr. Stokes, for the insolvent, consented to an order being made in terms of prayers 2 and 3 of the petition.

MACLEAN C.J. This really is not an appeal from a decision of *Mr. Justice Fletcher*, for he passed no order in the matter. It is an application under section 73 of the Insolvent Act and we have ample jurisdiction to make the order which we propose

to do. The Official Assignee has not appeared before us but the insolvent has and he does not object to the order.

It is quite clear from the correspondence and the evidence in the case that the present appellants considered that they ought to have been entered in the schedule of the creditors in respect of the amount they claimed and those who represented the Official Assignee took the same view, and in fact a petition was presented for amending the schedule in that respect. It appears, however, that the application for the final discharge of the insolvent came on, on the 3rd of March in this year and apparently the matter escaped the attention of the parties and of the Court and nothing was done in the matter. The creditors, the present appellants, now come and ask us to intervene under section 73 of the Insolvent Act. We think justice demands that that should be done, and, the appellants not desiring to cancel the order of discharge, and we think properly, an order should be made in terms of prayers 2 and 3 of their petition.

The costs of both parties may be paid out of the estate in the hands of the Official Assignee.

HARRINGTON AND BRETT JJ. concurred.

Application allowed.

Attorney for the appellant : *S. S. Hodson.*

Attorneys for the respondent : *Orr, Dignam & Co*

J. C.

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This was an action for the recovery of the sum of Rs. 11,630, the value of a cargo of jute covered by a policy of insurance issued by the appellant Company, and alleged to have been lost by fire.

The plaintiff Brojo Nath Shaha alleged that on the 14th September 1906, he loaded 977 drums of jute, valued at Rs. 11,629-11-9, in a boat at Ghiur in the District of Dacca and on the following day despatched the same to Calcutta in charge of manjee, Chandra Das.

On the 11th October 1906, the plaintiff Brojo Nath Shaha effected a policy of insurance with the South British Fire and Marine Insurance Company in the sum of Rs. 11,630 "being the value of 977 drums of jute including fire risk in the *Good Country Cargo Boat* No. ———— whereof Mohim Chandra is manjee and ————, the insured's charandar, beginning the adventure upon the aforesaid interest from the loading thereof on board the said boat at as aforesaid, and continuing during the time of voyage as aforesaid until landed or if not landed, until 3 clear working days after the arrival of the said boat at destination (if Calcutta within the limits of the Port) whichever may first occur." The adventures and perils which the Company agreed to bear and take upon itself in that voyage were "of the Rivers, Fire and of all other Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said subject-matter of this Insurance or any part thereof arising from the Perils of the Rivers and Inland Navigation.

The policy was made expressly subject, *inter alia*, to the following conditions and warranties, endorsed on the face of the policy :—

"Warranted free from average, unless caused by the boat being stranded, sunk or in collision with another boat or vessel.

"It is further warranted :—

2. "That the risk of loss or damage by fire is not insured hereby unless expressly so stated in writing hereon, in which

case such fire risk shall be subject to the following additional conditions :—

“(a) Any loss occasioned by smoking or cooking having been carried on in the said boat shall not be recoverable hereunder.

5. “That the assured shall provide a charandar on the said boat, and that the interest hereby insured shall be in his charge.

6. “That the assured shall provide the manjee or charandar of the said boat, before commencement of the voyage, with a sufficient sum of money to enable them to obtain labour and assistance in the event of accident during the voyage.

8. “That no smoking nor cooking shall be carried on in the said boat, but in a *dinghy* provided for the purpose.

9. “That in the event of loss :—

“(a) The manjee or charandar *must* report to the nearest Police Station within 24 hours and must state that the cargo is insured.

“(b) After report has been made to the Police, the manjee, charandar and two of the crew of the said boat shall proceed at once to Calcutta and report themselves to the Company, and shall thereupon make a declaration or statement regarding the said loss.

“(c) The assured shall within seven days of the happening of such loss furnish to the Company a true and faithful statement and detailed account of such loss (on form obtainable from the Company) shewing where and how such loss occurred.

“(d) The assured shall furnish and produce to the Company such further evidence, books of account or documents as they may reasonably require, and should such evidence, books of account or documents not be produced, the assured, shall forfeit his rights of recovery under this policy.

“(e) Should any false statement, overcharge, imposition, or misrepresentation be made by the assured, he shall forfeit all rights of recovery under this policy.

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“(f) It is furthermore hereby expressly provided, that no suit or action of any kind against the said Company for the recovery of any claim upon, under, or by virtue of this policy, shall be sustainable in any Court of law or equity unless such suit or action shall be commenced within the term of six months next after any loss or damage shall occur; and in case any such suit or action shall be commenced against the said Company after the expiration of six months next after such loss or damage shall have occurred, the lapso of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced.”

Premium at the rate of 3½ per cent., as stipulated in the policy, was duly paid by the plaintiff to the Insurance Company.

On the evening of the 14th October 1906, the boat arrived at Khager Chur, near Budartuni Thannah in the District of Barisal. It was alleged in the plaint, that while at Khager Chur, on the 14th October, the boat and the cargo of jute were totally destroyed by fire, and that the plaintiff's cause of action arose on the 14th October. The evidence given on behalf of the plaintiff, however, fixed the time of occurrence of the fire between the late hours of the night of the 14th October and 2 A.M. of the 15th October. It appears that Mohim Manji was the first to discover the fire; he aroused the rest of the crew, but in spite of their efforts to extinguish the fire, it took hold of the jute and the crew were forced to escape to the shore in a *dinghy*. The boat with the cargo of jute eventually sank. That night the crew remained on shore.

On the morning of the 15th October, the manji and two or three of his men proceeded to look for the sunken vessel: but they could discover only the blade of the rudder. The manji and crew spent the night of the 15th October at the house of a chowkidar, and on the morning of the 16th October at 8 A.M. they made a report at the Thannah at Budartuni. The fol-

lowing passage occurred in the report: "On the night of the 14th October they were near Khager Chur in the river Meghna; at about midnight, somehow or other the fire of the earthen pot having caught the jute in the boat burnt all the jute in the boat together with the boat itself, the remaining portion of the boat being sunk in the said river. The whole of the jute is burnt, all of them reached the bank in the *dinghy* which was with the boat and saved their lives. They do not know exactly how much worth of jute was in the boat."

On the same day, the plaintiff received a telegram from the manji Mohim Chandra in the following terms:—"Jute boat fixed Sunday last Badar Chur, Thana Budartnni." On the 17th October the plaintiff gave information of the loss to the defendant Company, who understood from the terms of the telegram that the boat had got aground. On the 20th October, however, the plaintiff heard by letter from Mohim that the boat had been burnt and this he communicated to the Insurance Company. On the 22nd October, the latter wrote to the plaintiff to send the manji to Messrs. Landalo and Clark's office at Chandpur, so that full particulars of the accident may be furnished to them, and to arrange to bring down the crew and the books of account in connection with the purchase of the jute at Ghiur. It appears that on the 3rd November 1906, the manji, Mohim Chandra, presented himself before the Manager of Messrs. Landalo and Clark at Chandpur, who after enquiring into the matter reported that from what he could gather, there appeared to have been no foul play.

The suit was instituted on the 16th April 1907. The Insurance Company in their defence raised a substantive case of an attempt by the plaintiff to defraud them. They denied that the plaintiff shipped the jute in question or that the boat referred to in the policy was destroyed by fire, and charged that the plaintiff with intent to defraud the Company, purchased an old and rotten cargo boat for Rs. 60 near Goalundo and loaded the same with earth and a small quantity of damaged jute, which had been salvaged from a country boat which had sunk near Faridpur, and a small quantity of other jute, and caused

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the boat and its cargo to be set on fire and sunk at Khager Chur. The Insurance Company took the further defence that the conditions of the policy and in particular conditions 5, 9 (a), 9 (b), 9 (c) were not complied with.

Chitty J., believing the evidence adduced on behalf of the plaintiff, gave a decree for the sum of Rs. 11,630 on the 26th of August 1907. After discussing the facts and evidence in the case, his Lordship concluded as follows :—

" I accept then the story of the plaintiff as to the shipment and the loss, and the only question that remains is whether he is precluded from recovering the amount due on the policy by reason of its conditions. Now the conditions relied upon are those contained in the margin of the policy and numbered 9 (a) (b) (c).

No. 9 has six sub-divisions and the last three (d) (e) (f) distinctly provide that by a breach of the condition the assured shall forfeit his rights of recovery under the policy. The first three clauses do not contain any such provision and it is obvious why they should not. The first is that the Manji or Charandar must report to the nearest Police station within 24 hours and state that the cargo is insured.

Well here there might be no Police station within twenty four hours' distance or the Manji or Charandar or both might be drowned. It might be a condition impossible of fulfilment. The next is as to the Manji and crew proceeding to Calcutta. In this case that condition was clearly waived because the enquiry was to be held in the first instance at Chandpore. The report was made in Calcutta by the plaintiff himself, and the Company certainly did in their first letter say that the crew should be required to attend but afterwards apparently they raised the charge of fraud and the crew were not asked to come down here.

So also with regard to provision (b) an offer of the books was made to the defendant Company but Hari Babu the clerk who interviewed the plaintiff and his agent said it was of no use producing them then.

It appears to me, however, that the absence from these three provisions of the clause as to forfeiture clearly shows that they were not to be regarded as conditions precedent. After Counsel for the plaintiff had replied, some cases were quoted by Counsel for the defendant Company with regard to Marine Insurances and warranties in such policies, but it appears to me that they have no application to the present case. There must therefore be a decree for the plaintiff for Rs. 11,630 and costs on Scale No. 2. Interest on judgment at six per cent."

From this judgment the defendant Company appealed.

Mr. Dunne (The Advocate-General, Mr. Garth and Mr. Pugh with him), for the appellant Company. The plaintiff's claim

cannot be supported on two grounds : *first*, on the evidence it is clear the claim was entirely fraudulent ; *secondly*, the assured did not fulfil the conditions and warranties appearing on the face of the policy, especially those contained in clauses 2, 5, 8 and 9. A condition whether material to the risk or not must, unless waived, be strictly fulfilled as a condition precedent to the right of the assured to recover, and if not so fulfilled the insurer is discharged from liability as from the date of breach. Where performance of a condition is traversed by the defendant, the onus lies on the plaintiff to prove such performance, unless he can prove waiver. Condition 5 was not performed by the assured. As regards condition 8, it was proved there was an earthen pot containing fire on board, which could be used only for cooking or smoking purposes : the onus was thrown on the plaintiff to shew that the loss was not due to fire caused by cooking or smoking. Conditions (a), (b), (c), (d) contained in clause 9 were not performed. [Fletcher J. By clause 9 (f) it is provided that no suit against the Company shall be sustainable upon the policy, unless commenced within six months next after any loss shall occur ; if the word " month " be taken to mean a " lunar " month, the suit is clearly out of time.]

It is a recognised rule of construction in England, except in cases of mercantile contracts within the city of London, that " month " means " lunar month." The onus does not lie on me to prove that in India, we come within the rule and not within the exception. The ordinary meaning of " month " in English is " lunar month " and not the artificial month in the Gregorian Calendar. Section 25 of the Limitation Act can have no application as was pointed out by Ameer Ali J. in *Latifunessa v. Dhan Kunwar* (1) in considering *Rungo Bujaji v. Babaji* (2). There was no question here of limitation by statute, but the time within which an action could be brought was limited by contract between the parties. Even if " month " be construed to mean " calendar month " the plaintiff was out of time. The cause of action was expressly stated in the

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(1) (1897) I. L. R. 34 Calc. 392, 395.

(2) (1891) I. L. R. 6 Bom. 83.

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plaint as having arisen on the 14th October 1906, and
plaint was dated the 15th April 1907.

Mr. Hill (*Mr. B. C. Mitter* with him), for the respondent.
Assuming that "month" means "calendar month," it
submitted the plaintiff was within time. The day on which
the cause of action arose must be excluded in the computation
of the six months: *Goldsmiths, Company v. West Metropolitan Railway* (1), also section 12 of the Limitation Act
[*Fletcher J.* referred to *South Staffordshire Tramways Company v. Sickness and Accident Assurance Association* (2).]

Moreover, inasmuch as the 13th and 14th April 1907 were
Court holidays, and the plaint was filed on the 15th April,
if submitted the plaintiff was in time: *Shooshee Bluskar v. Rudro v. Gobind Chunder Roy* (3) and *Surendra Narayan Mustafi v. Souravini Dasi* (4). The question of construction
as to whether "month" means a "lunar month" or a "calendar month" is one of evidence and dependent on the intention
of the parties. It has always been the practice, and if
submitted the intention of the parties to the present
policy must have been, to regard "month" as "calendar
month." In England the term "month" has been construed
to mean "calendar month" in policies of Fire Insurance and
Mercantile Documents in general: see *Porter on Fire Insurance*,
3rd edition, page 200, and *Norton on Deeds*, page 158
see *Craies on Statute Law*, 4th edition, page 150: "Unless a
contrary intention appears, 'month' means 'calendar month'
in every Act passed after 1850, and in contracts for the sale
of goods it is presumed to have the same meaning."

[*Fletcher J.* In England, the general rule of construction
is that "month" means "lunar month" the only excep-
tion judicially recognised is with reference to mercantile trans-
actions in the city of London: *Norton on Deeds*, page 159
and *Bruner v. Moore* (5). Also it follows from the passage
quoted from *Craies*, that before the rule was amended by the
statute of 1850, "month" meant "lunar month."]

(1) [1904] 1 K. B. 1, 4.

(2) [1891] 1 Q. B. 402.

(3) (1899) 1 L. R. 18 Cal. 231.

(4) (1906) 3 C. L. J. 339.

(5) [1904] 1 Ch. 305.

The rule of construction in England does not necessarily apply here. Section 25 of the Indian Limitation Act provides that reference *shall* be made to the Gregorian Calendar.

It would appear that the warranties appearing on the face of the policy were conditions: *Barnard v. Faber* (1). But the question is whether they were conditions precedent? It is submitted they were not, on the authority of *Stonham v. Ocean Railway and General Accident Insurance Company* (2).

[Fletcher J. Rules of construction governing a policy of Life Insurance, can have no application to a policy of Marine Insurance.]

There is internal evidence in the policy as to which conditions were intended by the parties to be conditions precedent, viz., the conditions with clauses providing forfeiture attached—condition 9, clauses (d), (c), (f). It is submitted the other conditions in the policy were not conditions precedent. Where it was intended to contest the performance of a condition precedent, the duty lay on the defendant Company to specifically plead it: see Judicature Act, Order 19, rules 14, 15, Civil Procedure Code, section 114. A general traverse in the written statement that the conditions precedent had not been performed by the plaintiff, would not avail the defendant.

The defence under condition 9 (f) was not pleaded in the written statement, nor raised in argument in the Court of first instance, nor in the memorandum of appeal. A condition precedent can be waived and it is submitted that by pleading over, the defendant Company has waived the condition. It is submitted there has been waiver of condition 9 (b), (c) and (d). [Fletcher J. If a condition precedent has not been performed, it lies on the plaintiff to specifically plead waiver.] The general rule is that the onus of proof lies on him who asserts a fact, and not on him who denies it. The onus of proof here lay on the insurers: *Aga Syud Saduck v. Hajee Jackariah Mahomed* (3) and *Rucker v. Green* (4).

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(1) [1893] 1 Q. B. 340, 342.

(3) (1869) 2 Ind. Jur. 203

(2) (1887) L. R. 19 Q. B. D. 237.

(4) (1812) 15 East. 288.

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On the question of onus, there is good reason why there should be a difference between marine policies and others—as the underwriters may be ignorant of the circumstances prevailing at a foreign port, where loss may occur. It is submitted that the present policy was not a marine but an accident policy, as the adventures and perils insured against were those arising from the perils of the rivers and inland navigation. Under general principles of insurance law, the onus lay on the insurers to prove their exemption from liability: *Thomson v. Weems* (1), *Leete v. The Gresham Life Insurance Society* (2), *Bunyon's Law of Life Assurance*, 4th edition, page 126, and *Bunyon's Law of Fire Insurance*, 5th edition, page 96. The onus lay on the defendant Company to prove the substantive case of fraud they made: *Thurtell v. Beaumont* (3) and *Sooriah Row v. Cotalghery Boochiah* (4).

[Fletcher J. referred to *Muirhead v. Forth and North Sea Steam Boat Mutual Insurance Association* (5).]

Mr. Garth, in reply. The present policy is clearly one of marine insurance. Authorities on other kinds of insurance have no application to a policy of marine insurance.

Cur. adv. vult.

MACLEAN C.J. This is an appeal by the defendants from a judgment of Chitty J.

The suit was brought by the plaintiff against the defendants to recover the sum of Rs. 11,630 under a policy of assurance issued by the defendants in favour of the plaintiff, on a cargo of jute said by the plaintiff to have been shipped at Ghior on the 14th September 1906, and which the plaintiff alleges by his plaint was subsequently destroyed by fire on the night of 14th October 1906.

The policy in question which is dated the 11th October 1906 provides that, subject to the conditions and warranties

(1) (1884) L. R. 9 A. C. 571.

(2) (1851) 15 Jur. 116.

(3) (1823) 1 Bing. 339.

(4) (1838) 2 Moo. L. A. 113, 124.

(5) (1893) 10 T. L. R. 82.

herein specified, the defendants assured the cargo consisting of 977 drums of jute of the value of Rs. 11,630 on a voyage from Ghiur to Calcutta against the risks and the perils of the voyage including fire risk.

The warranties endorsed on the face of the policy so far as material are as follows :—“ It is further warranted (2) that the risk of loss or damage by fire is not insured hereby unless expressly so stated in writing hereon in which case such fire risk shall be subject to the following additional conditions :—(a) Any loss occasioned by smoking or cooking having been carried on in the said boat shall not be recoverable hereunder.

8. That no smoking nor cooking shall be carried on in the said boat but in a dinghy provided for the purpose.

9. That in the event of loss—

(a) the Manjee or Charandar must report to the nearest police station within 24 hours and must state that the cargo is insured.

(b) After report has been made to the police the Manji, Charandar and two of the crew of the said boat shall proceed at once to Calcutta and report themselves to the Company and shall thereupon make a declaration or statement regarding the said loss.

(c) The assured shall within 7 days of the happening of such loss furnish to the Company a true and faithful statement and detailed account of such loss (on form obtainable from the Company) showing where and how such loss occurred.

(f) It is furthermore hereby expressly provided that no suit or action of any kind against the said Company for the recovery of any claim upon, under or by virtue of this policy shall be sustainable in any Court of Law or Equity unless such suit or action shall be commenced within the term of six months next after any loss or damage shall occur and in case any such suit or action shall be commenced against the said Company after the expiration of six months next after such loss or damage shall have occurred the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced.”

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The defendants by their written statement first deny that the plaintiff shipped the jute in question; secondly, that the boat referred to in the policy was destroyed by fire; thirdly, they charge that the plaintiff with intent to defraud the defendants purchased an old and rotten cargo boat for Rs. 60 near Gealundo, and thereafter placed the same in the charge of Manji Mohim Chandra Dass and loaded the same with earth and a small quantity of damaged jute that had been salvaged from a country boat which sank near Faridpore and a small quantity of other jute and caused the said boat and its cargo to be set on fire and sank at Khager Chur on or about 14th October 1906; fourthly, the defendants did not admit that the conditions of the policy were complied with and in particular they do not admit—(a) that there was a Charandar on board and in charge; (b) that a report was made to the nearest police station within twenty-four hours stating that the cargo was insured, (c) that the Manji, Charandar or any of the crew proceeded to Calcutta, (d) that no detailed account was furnished within seven days, (e) that the boat was a good cargo boat.

This suit, which was instituted by the plaintiff on the 15th April 1907, came on for hearing before Chitty J., and on the 26th August 1907, the learned Judge gave judgment for the plaintiff for the amount claimed. Against this decision, the defendants have appealed.

Now, the story as told by the plaintiff and his witnesses is as follows:—The plaintiff is a trader in jute and other commodities at a place called Ghiur.

The plaintiff alleges that the cargo of jute covered by the policy was placed on board the boat of one Mohim Chandra Dass between the 31st August and 14th September 1906, a portion of the jute being placed on board in the canal at Ghiur on which the plaintiff's premises abut, the boat there owing to the shallowness of the water in the canal being then taken out into the river where the remainder of the jute was placed on board. This boat according to the evidence on behalf of the plaintiff had been purchased by Mohim from one Gopaswar

a few days prior to the date on which the jute was begun to be loaded.

On the 15th September the challan having been given to the Manji the boat started and on same day reached Raipore, where for a period of seven or eight days the boat was held up by stress of weather. The crew on board consisted of the Manji Mohim and four others and there was also a Charandar Hazari Duffadar.

The plaintiff also says that one Rameswar Chowdhry and his man accompanied the boat in their own dinghy for the purposes of making the soundings necessary for the safe navigation of the boat, and further that a dinghy was also attached to the boat for the purpose of cooking as required by the terms of the policy.

On the evening of the 14th October the boat arrived at Khager Chur.

At some time between the late hours of the night of the 14th October and two o'clock in the morning of the 15th October Mohim, the Manji, awoke and found the boat on fire. He immediately aroused the rest of the crew, but despite all their efforts the fire took hold of the jute, and they were forced to abandon their efforts and escape to the shore in the dinghy. The fire on the boat continued and eventually the boat sank. The Manji and crew spent the rest of the night or rather the early morning on the banks of the river bemoaning their fate.

On the morning of the 15th October the Manji and two or three of his men proceeded to look for the sunken vessel, the only trace, however, that they could find of it was a blade of the rudder.

The Manji and crew spent the night of the 15th at the house of one Ishan Ali, a Chowkidar, and on the morning of the 16th at 8 A.M. they made a report at the thanah at Badartuni. This report and the time of making it are of some importance, and we shall refer to this report more in detail at a later stage of our judgment.

On the same morning the Manji telegraphed to the plaintiff at Calcutta, informing him that the boat had been "fixed."

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the word "fixed" as sent in the telegraphic despatch is an obvious error for "fired."

The plaintiff informed the defendants of the loss on the 17th. At first the defendants thought that having regard to the terms of the telegram that the boat had got aground. On the 20th October, however, the plaintiff received a letter from Mehim informing him that the boat had been burnt, and this he communicated to the defendants who on 22nd October wrote to the plaintiff asking him to send the Manji to Messrs. Landale and Clark at Chandpur and the crew to Calcutta. This is a brief outline of the case made, or attempted to be made, by the plaintiff and his witnesses.

Turning then to the case set up by the defendants. In the first place it is to be noticed that the defendants in this case have raised a substantive case of an attempt by the plaintiff to defraud them.

Their case is that the plaintiff had on the 25th August shipped 425 drums of jute on board belonging to one Sharabut Ali, and that this boat on the 29th August sank near Faridpore. The jute of the plaintiff on board Sharabut's boat was uninsured. The defendants allege that the plaintiff owing to this loss was not in a good financial condition, and with a view to repair his losses he purchased for Rs. 60 an old and rotten boat. Then having effected the policy and having loaded this boat with some of the jute that was salvaged from Sharabut's boat and earth, together with a small quantity of jute in good condition, this old and rotten boat, with its composite cargo along with two tins of kerosine oil which had been placed on board was set fire to with intent to defraud the defendants by pretending that this old loaded boat as alleged was the boat and cargo mentioned in the policy.

Having gone through the whole of the evidence we think that there are elements of considerable suspicion connected with the plaintiff's case. The learned Judge, however, who tried the case and had the advantage of seeing and hearing the witnesses, has accepted the evidence of the plaintiff and his witnesses and has disbelieved the defendants' witnesses.

In these circumstances we do not think there is sufficient to justify us in differing from the findings of fact of the learned Judge as to the sailing of the boat with the jute on board and its subsequent destruction by fire.

The case does not end there, however, as we have to consider whether there have been any breaches of the warranties appearing on the face of the policy. With regard to these points we cannot think that these matters were dealt with in a wholly satisfactory manner at the trial. The points appear to have been dealt with only incidentally during the course of the trial and do not appear to have been very directly argued. Consequently most of the points arising on the warranties have not been dealt with by the learned Judge in the course of his judgment.

Now, the term "warranty" as used in Policies of Marine Insurance is used to denote two different kinds of conditions—first, it is used to denote a condition to be performed by the assured, and secondly, it is used to denote an exception from or limitation on the general words of the policy.

In the first case the warranties are conditions precedent to the policy—some of such conditions being precedent to the effectual making of the policy, others presuppose the contract made but are precedent to the accrual of a right to sue thereon, others declare the events in which all rights under the contract are forfeited, others deal with the mode of settling dispute, and others limit the period for bringing a claim. But in all cases whether the conditions be material to the risk or not, they must, unless waived, be fulfilled with the most scrupulous exactness, and if they be not so fulfilled there is a breach of an express stipulation which is one of the essential terms of the contract and the insurer is discharged from liability as from the date of the breach of warranty: see *Parson v. Watson* (1) and *Arnould on Marine Insurance*, 7th edition, page 617.

Performance of a warranty in a Marine Policy is not a stipulation for the breach of which an action lies, but a condition

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(1) (1778) 2 Cowp. 72b.

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precedent to the liability of the underwriter. (Arnould, page 731). Coming then to the warranties on the face of the policy in suit, the first warranty it is material for us to notice is that contained in condition 2(a), namely, that loss occasioned by cooking or smoking is excepted from the risk covered by the policy. It is impossible, however, to deal with this clause of exception independently of condition 8, which provides that no smoking or cooking shall be carried on in the said boat.

Now, the learned Judge has not by his judgment found what was the cause of the fire that destroyed the boat or whether or not smoking or cooking took place on board.

It has been urged before us on behalf of the plaintiff that the onus of proving that the cargo was destroyed by a fire caused by cooking or smoking lies on the insurers. This would appear to be so: *Boyd v. Dubois* (1); but this does not dispose of condition 8 which provides that no smoking or cooking shall be carried on in the said boat. Condition 8 is a condition precedent to the liability of the insurers under the policy; and if smoking or cooking was carried on in the said boat it matters not whether the smoking or cooking caused the fire or not. It would appear that the plaintiff must prove that he has complied with all warranties as being conditions precedent to the policy attaching (Arnould, page 1452) or that the performance thereof has been effectually waived.

As we have already said the learned Judge has made no findings at all with regard to the cause of the fire or whether or not smoking or cooking took place on board. When we come to examine the oral evidence given at the trial, we find there is a conflict of testimony on this point. There is, however, an important piece of documentary evidence on this point which we must consider. In the report made by Mohim, the Manji, and the crew at the thanah on the 16th October, and when the facts must have been fresh in their memory within two days of the loss we find that they stated that "at about midnight (i.e., on the 14th October) somehow or other

the fire of the earthen pot having caught the jute in the hoat burnt all the jute in the hoat."

Now it seems to us from the wording of this report that there was fire in an earthen pot on board which set fire to the jute. This fire would be presumably used for the purpose of smoking or cooking. It is said, however, on behalf of the plaintiff that as the onus of proving a loss occasioned by cooking or smoking under condition 2 (a) of the policy is on the defendants this statement falls short of proving that the fire was occasioned by cooking or smoking. Even if that be so, the onus of proving compliance with condition 8 is on the plaintiff, and it matters not for the purpose of condition 8 whether or not the smoking or cooking caused the fire. In our opinion, having regard to the evidence adduced on behalf of the plaintiff that the loss was caused by the fire in an earthen pot on board which could be presumably only used for the purpose of cooking or smoking, we hold that the plaintiff has not shown that the provisions of condition 8 have been complied with.

We next come to condition 9 (a) which provides that in the event of loss the Manji or Charandar must report to the nearest police station within 24 hours and must state that the cargo is insured. Now it is not suggested on behalf of the plaintiff that this condition was complied with. The evidence on behalf of the plaintiff is that the fire occurred either in the late hours of the night of October 14th or before two o'clock in the morning of October 15th. Some witnesses say the former, some the latter, and that the report was not made to the police station until 8 A.M. on October 16th, and such report did not state that the cargo was insured. It is said on behalf of the plaintiff, and this view was accepted by the learned Judge, that as there might be no police station within 24 hours distance, or the Manji or Charandar or both of them might be drowned, the condition is one which might be impossible of fulfilment and therefore may be neglected. With the greatest respect to the learned Judge we are unable to agree in this view. The condition is one of the essential conditions on the footing of

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which the defendants contracted with the plaintiff; by inserting it the parties must be taken to have considered it of importance, and it is only on the fulfilment of this and other conditions that the liability of the defendants attaches. The fact that the condition may be impossible of fulfilment cannot affect this liability; if it were intended to do so qualifying words should have been introduced into the contract. On this point we may refer to the case of *Worsley v. Wood* (1), in which case it was stipulated "that the person assured should procure a certificate from the minister, churchwardens and some respectable house-holders of the parish not concerned in the loss importing that they were acquainted with the character and circumstances of the person insured, and knew or believed that he by misfortune and without any kind of fraud or evil practice had sustained by such fire the loss and damage therein mentioned." It was held that the procuring of such certificate was a condition precedent to the right of the assured to recover, and that it was immaterial that the minister, churchwardens, etc., wrongfully refused to sign the certificate. We may also refer to the case of *Law v. George Newnes* (2).

The next conditions we come to are conditions 9 (b) and (c). It is not suggested that these two conditions were performed. The plaintiff, however, says the performance of these two conditions was waived by the defendants.

On the 22nd October 1906, Messrs. Finlay, Muir and Company, the agents for the defendants, wrote to the plaintiff: "Please send the Manji to Messrs. Landale and Clark's Office at Chandpur, so that the full particulars of the accident may be furnished to them; please also arrange to bring down the crew." The Manji did proceed to Chandpur to Messrs. Landale and Clark and was examined by them; the crew, however, did not come to Calcutta. The learned Judge on these facts has found that the defendants waived the performance of conditions 9 (c) and (d). So far as there was any waiver it seems to us that there was only a waiver as to the Manji coming down to

(1) (1795) 6 T. R. 710.

(2) 31 Sc. L. R. 888.

Calcutta—the letter distinctly asks that the crew be brought down. In the view that we take on other points in the case, it becomes unnecessary for us to enter further into this point.

The last condition that we need refer to is condition 9 (f) which limits the right of suit on the policy to a term of six months next after the loss. This condition is of the utmost importance for if the argument on behalf of the defendants is well founded this suit was instituted after the period within which the parties expressly contracted that a suit must be brought. Now the fire on the boat occurred late on the night of the 14th October or the early morning of October 15th, 1906. This suit was not instituted until the 15th April 1907. It is therefore a matter of ell importance to determine whether or not the word “month” as used in the condition means lunar month or calendar month. Now it is abundantly clear on the authorities in England that the word “month” in all contracts, except there is some evidence to show that “calendar month” is meant, means lunar month except in mercantile transactions in the City of London where “month” means “calendar month.” In support of this we need not do more than refer to the decision in *Simpson v. Margetson* (1), *Turner v. Barlow* (2) and *Bruner v. Moore* (3). The ordinary meaning of the word month in the English language is a lunar month and not the artificial month in the Gregorian calendar. This is sufficiently shown by the fact that until the year 1850 the word “month” in an Act of Parliament meant “lunar month,” since which date, however, by virtue of a statutory enactment the word “month” is used in Acts of Parliament to mean a calendar month. But the rule as to “month” meaning a “lunar month” in contracts still remains the law in England.

The learned counsel, however, for the plaintiff has argued before us that the rule is different in India having regard to certain Statutory Enactments of the Indian Legislature. The Statutory Enactments relied on are the General Clauses Act and section 25 of the Indian Limitation Act.

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(1) (1847) 17 L. J. Q. B. 81.

(2) (1863) 3 F. & F. 946.

(3) [1904] 1 Ch. 305.

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The definition of the word "month," however, in the General Clauses Act is only for the purpose of Acts passed by the Indian Legislaturo. Then coming to section 25 of the Limitation Act, all that section provides is that for the purpose of that Act time shall be computed according to the Gregorian calendar. The object of the section is obvious; here in India there are in use several calendars, the Gregorian and the Bengali, Samhat, so forth—each of which divides the year artificially in a different manner, and for the purpose of the Limitation Act section 25 provides that the Gregorian calendar is to be used. This section therefore appears to us to have no bearing on the question what is the meaning of the word "month" in a contract drawn in the English language. In various statutes in India a month is defined as a calendar month; this would have been unnecessary if that were its ordinary meaning. As we have pointed out above it is clear in England that the word "month" in a contract means "lunar month," and we see no reason why the interpretation of an ordinary word in a contract in English should bear a different signification in India to that in England. But even if month in the policy mean calendar month, the plaintiff is apparently out of time. According to some of his witnesses the fire occurred before midnight of the 14th October. In his plaint he says the fire occurred on the 14th, the suit was not instituted until the 15th April, one day after the expiration of the six months.

We think, therefore, that for the reasons given above this suit is not maintainable by the plaintiff and that the judgment of the learned Judge was wrong and ought to be reversed. This appeal must therefore be allowed with costs both here and in the Court below.

HARINGTON J. This is an appeal by the defendants against a judgment of this Court in its original jurisdiction in favour of the plaintiff in an action on a policy of insurance on a cargo of jute.

The plaintiff alleges that the jute in question was loaded in a country boat bound from Ghior to Calcutta: when near

Khager Chur the jute caught fire and the boat and cargo became a total loss.

When sued on the policy the defendants denied that the cargo was shipped, or that the boat was despatched from Ghur. They denied that the boat referred to in the policy was destroyed by fire and alleged that the plaintiff had purchased an old boat of small value; loaded it with some damaged jute; and maliciously set it on fire so as to defraud the defendant Company. They further did not admit that the conditions of the policy had been complied with, and in particular charged certain specific breaches of specific conditions.

The learned Judge who heard the case came to the conclusion that the story told by the plaintiff was substantially correct, and that the story of the defendants as to the purchase of the old boat and as to the fraud perpetrated was entirely unworthy of belief.

We have heard the evidence dealt with, and I must confess that the plaintiff's case seems to me to be open to very grave suspicion. It is, however, needless to deal with the evidence, because though on paper there are many grounds for doubting its reliability, I do not feel sufficiently convinced of its falsity to justify me in differing on the facts from the learned Judge who both saw and heard the witnesses.

But the substantial grounds of appeal which the appellant has pressed arise on the non-compliance by the plaintiff with the conditions to be found on the face of the policy. The learned Judge in construing these conditions has held that a distinction must be drawn between the clauses which provide that on a breach of the condition the assured shall forfeit his rights under the policy, and the clauses which contain no such condition, and, that as some of the latter might become impossible of fulfilment, a compliance with them must not be taken as a condition precedent to the assured's right to recover. Further as to clause 9(b) he has held that there has been a waiver by the defendants.

The appellant argues that the plaintiff was bound to prove that he had complied with the warranties appearing on the

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face of the policy, and that not having done so his claim must fail. Further, that on the evidence adduced it has been proved that he did not comply with certain of these warranties, and in particular that on the face of the plaint it was shown that the action was brought too late.

He also contends that it lay on the plaintiff to prove that the loss was not due to a fire caused by cooking or smoking from which risk the policy was warranted free.

I do not agree with the last argument. The policy of insurance is a contract to indemnify the plaintiff against loss—*inter alia* against loss by fire—the plaintiff having proved the policy, his interest, and the loss is entitled to be indemnified if the defendant while admitting the loss desires to show that the fire which caused the loss was due to a particular risk which had been excepted from the risks he had undertaken to bear—then I think he was bound to aver that in his pleadings, and to prove it at the hearing. But this he has not done; there is no plea that the loss was due to cooking or smoking having been carried on in the boat, and therefore was not recoverable under clause 2 (a) of the warranties appearing on the policy. There has been a suggestion in the course of the argument that the Manji's report to the police, in which he states that the fire in an earthen pot communicated with the jute, establishes the fact that the fire was caused by smoking or cooking; but in my opinion the evidence does not go to that length. The witness should have been cross-examined on this point. The appellant's contention therefore that he is relieved from liability by clause 2 (a) must fail.

Next with regard to the warranties appearing on the face of the contract, those in clause 2 are exceptions from the risk which the defendants were willing to undertake—the others are conditions and in my opinion are conditions precedent to the assured's right to recover under the policy.

First, as a general rule conditions appearing on the face of the policy are conditions precedent, and secondly some of the conditions at any rate directly affect the risk to be undertaken by the insurers. For instance, clause 5 provides for the

appointment of a Charandar to take care of the cargo. Clause 6 the provision of money to enable assistance to be got in case of accident. Clause 8 provides that no smoking or cooking shall be carried on in the boat. If these conditions are not complied with the risk of loss is substantially increased. It was argued that clause 8 was unnecessary as long as the policy contained the exception in clause 2 (a), but I do not agree with the contention. The presence of fire for cooking or smoking would materially increase the risk of loss by fire; if the defendant could prove that the fire was caused by smoking or cooking, he would of course be absolved from liability under clause 2 (a), but it would remain that the fire risk was increased while the defendants could not escape liability without proving that the fire was caused by smoking or cooking, and that might be extremely difficult for them to do. There is authority for the proposition that any statement of fact or any promise material to the risk undertaken by the insurers is a condition precedent which must be strictly complied with; and where the performance of the conditions is traversed by the defendant, such performance must be proved by the plaintiff unless he relies on a waiver by the insurers of their right to insist on the fulfilment of the conditions: *Thomson v. Weems* (1), *Barnard v. Faber* (2).

I think therefore that the plaintiff was bound to prove a compliance with the warranties appearing on the face of the contract as a condition precedent to his right to recover.

He has not proved that he did comply with the conditions. On the contrary it has been proved that no report was made at the nearest police station within 24 hours as provided by clause 9 (a) of the conditions nor when the report was made, was there any statement that the cargo was insured. Lastly the appellant contends that the action was not brought within six months after the loss—the plaintiff therefore is debarred from recovering under clause 9 (f) of the policy.

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(1) (1884) L. R. 9 App. Cas. 671, 684. (2) [1893] 1 Q. B. 340, 344.

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On the face of the pleadings the plaintiff is clearly barred for his plaint is dated April 15th, and in it he alleges the loss occurred on October 14th and that his cause of action accrued on that day.

If that statement be true then his time for bringing the action must expire on April 14th, and indeed the plaintiff only becomes entitled to that delay if month be construed as "calendar month," and if notwithstanding the very express words of the policy "that the action shall be commenced within the term of six months next after any loss or damage shall occur, and if any such suit or action shall be commenced after the expiration of six months next after such loss or damage shall have occurred, the lapse of time shall be taken as conclusive evidence against the validity of the claim," the English rule of construction be adopted, and the day of the occurrence excluded from the period: *Radcliffe v. Bartholomew* (1).

But the appellant contends that even adopting the English rule of construction and excluding the day of the occurrence the plaintiff is out of time, because "month" means "lunar" and not an English calendar month.

In England there is a dictum at *Nisi Prius* in the case of *Hart v. Middleton* (2) to the effect that in mercantile transactions "month" means calendar, and not lunar month, but that dictum is directly at variance with the case of *Bruner v. Moore* (3), which lays down that month means lunar month, though the presumption that month means lunar month can be displaced by evidence to show that in any particular instance it was intended by the parties to mean calendar month or that there was a custom or a statute under which month meant in the particular case calendar month. That the latter case, which is a carefully considered judgment and not the dictum in *Hart v. Middleton* (2), expresses what is really the law is shown by legislation for in the Sale of goods Act 56 and 57 Viet. c. 71, section 10 (2), it is enacted that in a contract of sale "month" means *prima facie* "calendar month." This

(1) [1892] 1 Q. B. 161.

(2) [1845] 2 Q. & K. 2.

(3) [1904] 1 Ch. 305.

provision would have been quite unnecessary had the dictum in *Hart v. Middleton* (1) been a correct statement of the law.

Is the law as laid down in *Bruner v. Moore* (2) applicable here? To begin with a reason exists for interpreting "month" in this country to mean lunar month which does not exist in England. Here a month if a lunar month would express the same period of time to all the peoples who dwell in India, while if construed as a calendar month it would not, but would vary with the different calendars used, i.e., whether English, Bengali, Sambat, etc. If therefore "month" were construed calendar month, then another question would have to be determined, and that would be by what calendar the month was to be measured, and in all cases where the contracting parties were accustomed to use different calendars, as for example in a contract between an Englishman and a Bengali, it would be necessary to prove by evidence which calendar the parties intended their month to be measured by.

But I think the course of legislation shows that the word "month" in India as in England means *primâ facie* lunar month. In the Penal Code it is enacted that where the word month is used, it is to be understood that the month is to be reckoned according to the British calendar, and a similar provision is to be found in the Succession Act and General Clauses Act. I can find nothing in the Contract Act defining the meaning of "month" in a contract. Inasmuch as in the Acts to which I have referred "month" has a statutory meaning, I infer that it would not have had that meaning but for the statutes.

As there is no Act giving this statutory meaning to the word month in a contract to indemnify, I take it that in such a contract month bears the same meaning that it would *primâ facie* bear under English Law and would mean a lunar month.

For this reason, whether the loss occurred on the 14th October as alleged in the pleadings and in the report made to the police or at 2 A.M. on the 15th as stated by some of the

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witnesses, I think that the plaintiff's suit is barred by clause 9 (f) of the conditions appearing on the face of the policy. It has been argued that the defendants were bound to have averred the breach of this condition in their written statement, I do not think so because it was apparent on the face of the plaint for the plaintiff embodied in his plaint the policy and dated his plaint so as to show that it was filed more than six months after the date of the loss.

In my opinion, therefore, the plaintiff's suit must fail because it has been shown that he did not comply with clause 9 (a) and it has not been shown that he did comply with clauses 6 and 8 of the conditions on which the defendants were willing to indemnify him against loss, and secondly on the ground that his action is not brought within the time limited by clause 9 (f) of the conditions on the policy. I agree, therefore, that the appeal must be allowed.

FLETCHER J. The judgment delivered by the learned Chief Justice represents my judgment in the matter, and therefore agree.

Appeal allowed

Attorneys for the appellant Company : *Morgan & Co.*
Attorneys for the respondent : *B. N. Basu & Co.*

J. C.

APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Carnduff.

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Limitation Act (XV of 1877), Sch. II, Art. 180—Revivor of judgment," meaning and effect of—Scire facias, analysis of—Legislature, its power to alter laws and correct errors of Courts and significance of its silence—Civil Procedure Code (XIV of 1882), ss. 230, 234—Formal application for substitution of deceased decree-holder, not absolutely necessary—Two Codes, not to be so construed as to be conflicting—Civil Procedure Code (V of 1905), s. 43.

When the legislature used the term "revivor of judgment" in the Limitation Acts of 1871 and 1877, they had in view the procedure embodied in s. 216 of the Code of Civil Procedure of 1859 and s. 218 of the Code of 1877 and also the proceedings to revive then current in the Supreme Court, which were closely analogous to the (English) Common Law Procedure Act of 1852.

Scire facias analyzed and its history traced.

There is the same provision for revivor of judgments under the present law as there was under the old Statutes of Limitation.

Tincoorie Dawn v. Debendro Nath Mookerjee (1) dissented from.

Ashutosh Dutt v. Doorga Churn Chatterjee (2) followed.

Monohar Das v. Futeh Chand (3) explained and distinguished.

The balance of authority preponderates largely in favour of the view that the Statute of Limitation to which a judgment is subject ceases to run upon a revivor of the judgment, where the matter is not governed by Statute.

The English case-law on the point dealt with.

It is a well-settled principle of construction that the Legislature is presumed to know not only the general principles of law but the construction which the Courts have put upon particular Statutes.

English and American leading cases cited.

The principle of construction above enunciated is based on the ground that, as Legislature knows what the law is and has the power to alter it, any mistake on the part of the Judges may at once be corrected, and the absence

*Appeals from Original Orders, Nos. 437 and 480 of 1907, against the order of Parash Nath Chatterjee, Subordinate Judge of Hooghly, dated July 1, 1907.

(1) (1890) I. L. R. 17 Calc. 491.

(2) (1880) I. L. R. 6 Calc. 604.

(3) (1903) I. L. R. 30 Calc. 979.

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of any such correction, especially during a long period of time, indicates that the Courts have rightly ascertained the intention of the Legislature.

Phelan v. Johnson (1) followed.

Section 230 of the Code of Civil Procedure, 1882, ought not to be so construed as to make it conflict with the provisions of Art. 180 of the Limitation Act of 1877.

Mayabhai Prembhai v. Tribhuvandas Jagjeevandas (2), *Ganapathi v. Balanundara* (3) and *Futteh Narain Chowdhry v. Chundrabati Chowdhram* (4) followed.

Code of Civil Procedure of 1908, s. 48, noticed in this connection.

It is not necessary for the remaining decree-holders to make a formal application for substitution of a deceased decree-holder. Section 234 of the Code merely requires that the legal representative should apply for execution of the decree and that his name should be brought on the record.

Syud Nadir Hossein v. Baboo Pearoo Thorildarinee (5) and *Balkishoon v. Mahommed Tamaz Allee* (6) referred to.

APPEAL by Jogendra Chandra Roy, the judgment-debtor. Balkissen Das, Shyam Das and Mathura Das obtained a decree against Jogendra Chandra Roy, in the Calcutta High Court on the 16th December 1891, and in execution realised only a small portion of the decretal amount. On the 30th January 1897, a second application for execution was made, praying for attachment of decree No. 642 of 1893 in favour of Jogendra Chandra Roy, the judgment-debtor. The application proved useless owing to the subsequent final discharge of Ramsadoy Barat, the judgment-debtor in suit No. 642 of 1893. There was a third application for execution on the 1st January 1903 by Shyam Das and Mathura Das, for themselves and as the heirs and legal representatives by survivorship of the deceased Balkissen Das. The decree was then sent under section 223, Civil Procedure Code, to the Court of the Subordinate Judge of Hooghly for execution by that Court. On the 17th August 1906, Shyam Das and Mathura Das applied for execution of the decree in the second Court of the Subordinate Judge of Hooghly. The judgment-debtor objected on the grounds that the substitution should have been made formally and in the High Court, where the decree was passed,

(1) (1814) 7 Ir. L. R. 535.

(2) (1881) I. L. R. 6 Bom. 258.

(3) (1884) I. L. R. 7 Mad. 540.

(4) (1892) I. L. R. 20 Calc. 551.

(5) (1873) 10 W. R. 255.

(6) (1872) 4 All. H. C. 93

that execution was barred by limitation and that the present decree-holders, having previously attached a decree obtained by the judgment-debtor against one Ramsadoy Barat and the said judgment-debtor thereby being prevented from realizing his dues under the attached decree and having suffered loss in consequence, the present decree for execution should be treated as satisfied. The Subordinate Judge disallowed the objections. The judgment-debtor thereupon appealed to the High Court.

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Babu Jadunath Kanjilal, for the appellant. The application for execution is barred by limitation under Article 180 of the Limitation Act. Under the present law, there is absolutely no provision for revival of judgment, decree or order. Even if there is, in this case, there has been no revival. I rely on *Tincourie Dawn v. Debendro Nath Mookerjee* (1).

[MOOKERJEE J. What do you say as to *Ashutosh Dutt v. Doorga Churn Chatterjee* (2), *Futteh Narain Chowdhry v. Chundrabati Chowdhraim* (3), *Suja Hossein v. Monohur Das* (4) and the cases in the other High Courts: *Ganapathi v. Bala-sundara* (5), *Umrao Singh v. Lachmi Narain* (6) and *Beni Madho v. Shiva Narain* (7)?]

After the decision in *Tincourie Dawn v. Debendro Nath* (1) we must regard the earlier decisions erroneous. The still recent case of *Monohur Das v. Futteh Chand* (8) is in my favour: see also *Suja Hossein v. Monohur Das* (9). There should be a reference to the Full Bench if the cases I have cited are not followed.

Lastly, substitution on the death of a judgment-creditor should have been applied for in the Original Side of the High Court. No other Court had the authority to proceed with the execution at the instance of the remaining decree-holders.

(1) (1890) 1 L. R. 17 Cal. 491.

(2) (1880) 1 L. R. 6 Cal. 504.

(3) (1897) 1 L. R. 20 Cal. 551.

(4) (1896) 1 L. R. 21 Cal. 214.

(5) (1884) 1 L. R. 7 Mad. 510.

(6) (1901) 1 L. R. 26 All. 271.

(7) (1907) 4 All. L. J. 405.

(8) (1903) 1 L. R. 29 Cal. 972.

(9) (1923) 1 L. R. 22 Cal. 951.

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[MOOKERJEE J. Is actual substitution of the name of the legal representative, by *formal* application, absolutely necessary for the validity of execution proceedings ?]

Babu Baidyanath Dutt (*Babu Tarinidas Banerjee* with him), for the respondents, were not called upon.

Cur. adv. vult.

MOOKERJEE AND CARNDUFF JJ. This is an appeal on behalf of the judgment-debtor against an order for execution of a decree obtained by the respondents decree-holders against him on the 16th December 1891 on the Original Side of this Court. The decree was originally in favour of Balkissen Das, Shyam Das, and Mathura Das and was for a sum of Rs. 11,044 with interest. On the 2nd January 1892, execution proceedings were instituted, in the course of which a sum of Rs. 824 was realised. On the 30th January 1897, a second application for execution was made and the decree-holder applied for attachment of the interest of the judgment-debtor in a decree passed in another suit. Notice was served on the judgment-debtor and an order for attachment was made. The judgment-debtor under that decree, however, was an insolvent and obtained his final discharge; no further proceedings were, therefore, taken by the respondents on their application for execution. Subsequently Balkissen Das, one of the decree-holders, died, and on the 1st January 1903, the remaining decree-holders, one of whom had by survivorship acquired the interest of the deceased decree-holder applied to the Original Side of this Court for transfer of the decree to the Court of the District Judge of Hooghly, within the jurisdiction of which Court, it was alleged, the judgment-debtor resided and possessed properties. Notice was issued under section 248, Civil Procedure Code of 1882, upon the judgment-debtor on the 31st January 1903 and as no cause was shown on his behalf, an order was made on the 10th August 1906 for the issue of the necessary certificate. The decree was then transmitted to the Court of the Subordinate Judge, and on the 17th August 1906 the decree-holders presented in his Court the

usual application for execution. Notice was issued upon the judgment-debtor who appeared on the 8th December 1906 and objected to the execution substantially on the ground that the decree under execution was barred by limitation and also alleged that the property sought to be attached belonged to a religious endowment and was not liable to be sold in execution. The Subordinate Judge overruled these objections and ordered execution to proceed. The judgment-debtor has now appealed to this Court and on his behalf the decision of the Subordinate Judge has been challenged on four grounds, namely, *first*, that as the judgment-debtor has been declared an insolvent and all his properties have been vested in the Official Assignee, execution cannot proceed; *secondly*, that the application for execution is barred by limitation under Article 180 of the second schedule of the Limitation Act of 1877; *thirdly*, that as one of the decree-holders had died, the other decree-holders could not proceed with execution till they had made an application for substitution, which if made could be entertained only by the High Court, and *fourthly*, that as the decree-holders had in the second execution proceedings obtained an order for attachment of a decree in which the judgment-debtor was the decree-holder and as by reason of their default the interest of the judgment-debtor in that decree had been extinguished, the decree-holders should not be allowed to proceed with the present execution. We shall consider these objections in the order in which we have stated them.

In support of his first ground, the learned vakil for the appellant has invited our attention to an order made by this Court in its Insolvency jurisdiction on the 9th April 1878 by which the appellant Jogendra Chandra Roy was declared an insolvent and his assets were vested in the Official Assignee. There are no materials, however, on the record to show what has happened since 1878. Nor is there anything to show that the appellant has obtained his final discharge. This particular ground was not urged in the Court below, and all we need observe, is that upon the materials on the present record, the appellant has not satisfied us that he is entitled to protection

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from execution under the decree obtained by the respondents. The first objection taken on behalf of the appellant must consequently be overruled.

The second ground urged on behalf of the appellant is that the application for execution is barred by limitation under Article 180 of the Limitation Act of 1877. That Article provides that an application to enforce a judgment, decree or order of any Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction must be made within 12 years from the date when a present right to enforce the judgment, decree or order accrues to some person capable of releasing the right, provided that (we quote so much only of the section as has any application to the case before us) when the judgment, decree or order has been revived, the twelve years shall be computed from the date of such revivor. The learned vakil for the appellant argued that there is no provision under the present law for the revivor of a judgment, decree or order, and that in any event, there has not been in the present case such a revivor as is contemplated by the Limitation Act. He candidly conceded, however, that his contention was opposed to a series of decisions of this Court, namely, the cases of *Ashutosh Dutt v. Doorga Churn Chatterjee* (1), *Futleh Narain Chowdhry v. Chundrabati Chowdhraim* (2), *Suja Hossein v. Monohur Das* (3). It was also not disputed by him on behalf of the appellant that the rule laid down in these cases had been accepted as good law by the Madras High Court in *Ganapathi v. Balasundara* (4) and by the Allahabad High Court in *Unrao Singh v. Lachmi Narain* (5) and in *Beni Madho v. Shiva Narain* (6). The learned vakil for the appellant, however, strenuously contended upon the authority of the observations of Mr. Justice Wilson in the case of *Tincowrie Dawn v. Debendro Nath Mookerjee* (7) that those decisions were erroneous; and he also placed reliance, to some extent, upon the

(1) (1880) I. L. R. 6 Calc. 504.

(4) (1884) I. L. R. 7 Mad. 540

(2) (1892) I. L. R. 20 Calc. 551.

(5) (1904) I. L. R. 20 All. 361

(3) (1896) I. L. R. 24 Calc. 244.

(6) (1907) 4 All. L. J. 405

(7) (1890) I. L. R. 17 Calc. 491.

cases of *Monohar Das v. Fulleh Chand* (1) and *Suja Hossein v. Monohur Das* (2) which latter, however, was subsequently set aside on review, the judgment on rehearing *Suja v. Monohur* (3) negating the contention of the present appellant. In this state of the authorities, the learned vakil for the appellant invited us to consider the matter upon principle in view of a possible reference to a Full Bench.

Article 180, to the terms of which we have already referred, provides that the period of 12 years is to be computed from the date of revivor of the judgment, decree or order sought to be enforced. The term revivor is nowhere defined in the Limitation Act, nor is any definition of the term given either in the General Clauses Act or in the Code of Civil Procedure. As pointed out, however, by Mr. Justice White in *Ashutosh Dutt v. Doorga Churn Chatterjee* (4) the provisions of Art. 180 are a reproduction of those of Art. 169 of the Limitation Act of 1871, which again were based upon section 19 of the Limitation Act of 1859. At the time when the Limitation Act of 1859 was passed, there was a procedure for revivor of judgment on the Original Side of this Court. The 195th of the Rules of 1851 on the Plea Side of the Supreme Court recognized the principle that execution could not issue upon judgments more than a year old without issuing out a writ of *scire facias* against the defendant; and a reference to the Plea Rules of 1837 (Rules and Orders of the Supreme Court by Smolttand Ryan, 1839, Vol. II, page 93) shows that the rule in question had been in force for many years and had been introduced into the Chartered High Courts from the English law which governed its operation and effects. There can be no question, therefore, that when the Limitation Act of 1859 was passed by the Legislature, proceedings for revivor of judgment were matters of common occurrence and the Legislature had undoubtedly this procedure in view when they laid down in section 19 of Act XIV of 1859 that the period of twelve years was to run from the date of revivor.

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(1) (1903) I. L. R. 30 Calc. 979.

(2) (1895) I. L. R. 22 Calc. 921.

(3) (1896) I. L. R. 24 Calc. 244.

(4) (1880) I. L. R. 6 Calc. 504.

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When, however, the Limitation Acts of 1871 and 1877 were passed, although the term "revivor" was reproduced, the writ of *scire facias* had become obsolete and its place had been taken by the procedure contained in sections 215 and 216 of Act VIII of 1859 which were replaced by sections 245 and 248 of the Codes of 1877 and 1882. The question therefore arises, what operation had the Legislature in view in 1871 and 1877 when they spoke of revivor of judgment in the Limitation Act. It would be unreasonable to assume that the Legislature contemplated a contingency which could no longer possibly arise. It is consequently necessary to examine for a moment the true nature of the process of revivor of judgment by the writ of *scire facias* and to determine whether there is anything in the present law which substantially corresponds to that process. Now, it is a matter of common learning that *scire facias* was "a writ founded on some matter of record, as recognizance or judgment, on which it lies to obtain execution or for other purposes as to repeal Letters Patent, hear-errors, &c. In general, it was a judicial writ issuing out of a Court where the record was, because the defendant might plead thereto; it was considered in law an action; therefore a release of all actions was a good bar to *scire facias*": *Tidds' Practice*, 1828, Chap. 43, page 1090. In other words, a *scire facias* was a judicial writ issued for the purpose of substantiating and carrying into effect an antecedent judgment. As pointed out in *Freeman on Judgments*, Vol. II, section 442, before a judgment was either satisfied by payment or barred by lapse of time, it might become temporarily inoperative so far as the right to issue execution was concerned, and so continue until something was done by which such right was revived; in this condition it was usually called a dormant judgment. This dormancy in judgments was at common law usually created either by a change in the parties, plaintiff or defendant, or by the lapse of time without the issuing of execution. There were also cases in which execution was to be issued in certain contingencies only, and in which it became necessary to establish the existence of the contingency before the writ could be regularly issued out.

So the judgment might have been satisfied through fraud or mistake or by execution upon property not belonging to the defendant, and it might, therefore, be necessary to set aside the satisfaction and to obtain leave to issue further execution. When from any cause it became necessary to apply to a Court for a revivor of the right to issue execution, the remedy of the plaintiff was by a *scire facias*. As was very clearly put in *Brown v. Harley* (1) "a *scire facias* to revive a judgment is not an original but a judicial writ founded on some matter of record, to enforce execution of it, and properly speaking, is only the continuation of an action, a step leading to the execution of a judgment already obtained and enforcing the original demand for which the action was brought. It creates nothing anew but may be said to reanimate that which before had existence but whose vital powers and faculties were, as it were, suspended and without its statutory influence, would be lost." The objects of a *scire facias* therefore were: (i) to revive an ordinary judgment between the parties thereto, (ii) to obtain execution where a new party is to be charged or benefited, (iii) to obtain execution on a contingent judgment upon the happening of the contingency. As between the original parties, a *scire facias* became necessary, (i) where by the fault of the plaintiff no execution had issued out within a year and a day after the entry of the judgment, (ii) where at any time the judgment seemed to be satisfied when in fact it remained wholly or partly unpaid. The cases in which it became necessary to prosecute a *scire facias* to obtain the benefit of an execution for or against a new party, arose when a change of parties occurred through the death, marriage or bankruptcy of one of the parties: see *Freeman on Executions*, Vol. I, Secs. 27, 28, 53, 54, 83, 84 and 85. The writ was next served, and upon return made, if any one appeared in response to the writ, he would be heard. It is unnecessary to consider what might be pleaded by the defendant either in bar or in abatement, but it may be generally stated that no ground of defence anterior to the old judgment sought to be enforced could be brought

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(1) (1848) 2 Fla. 164.

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forward, just as no cause of action beyond the old judgment could be asserted and no relief beyond what was embraced therein obtained. Finally, the judgment entered upon the *scire facias* would be simply that the plaintiff will have execution for the judgment mentioned in the said *scire facias* and costs: Freeman on Executions, Vol. I, section 92 (a). The substance of the matter, so far as we are concerned, may therefore be thus stated: a *scire facias* is a judicial writ founded on some matter of record and having for its object the prevention of undue surprise by interposing itself as a warning between judgment and execution wherever a new party is to be charged or benefited by such execution, whenever such execution is contingent, after judgment, on the existence of certain circumstances to be first proved by the party charging; and lastly, whenever execution has been delayed beyond the specified period (a year and a day under the common law) after the judgment was signed, that delay not arising from the party charged: Bingham on Judgments and Execution, page 122; Freeman on Execution, Vol. I, section 81.

If now we bear in mind the essential features of a writ of *scire facias* and of the result to be gained by a recourse to it, it is by no means difficult to identify it substantially with the procedure embodied in section 248 of the Code of Civil Procedure. The object of this procedure as also of the procedure embodied in the corresponding section 216 of the Code of 1859, was to give notice, so as to prevent undue surprise to a judgment-debtor when more than one year had elapsed between the date of the decree and the application for execution or when the decree was sought to be enforced against the legal representative of the party against whom the decree was originally made. It seems to us to be fairly obvious, therefore, that when the Legislature used the term "revivor of judgment" in the Limitation Acts of 1871 and 1877, they had in view the procedure embodied in sections 216 of the Code of 1859 and 248 of the Code of 1877.

We are further fortified in this view by an examination of the provisions of the Common Law Procedure Act of 1852,

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between the same parties and was only necessary because the time for execution had elapsed, a new present right to receive was given by the judgment in *scire facias* when that right was necessary in consequence of the death of the parties. This doctrine was approved by Lord Lyndhurst in *Farrel v. Gleeson* (1) and may be taken as settled as regards a revivor against the representatives of a deceased party to the existing judgment. This case before the House of Lords, however, left open the effect of a revivor as between the original parties. The question was directly raised in *Griffin v. Blake* (2) and it was held by Smith M. R. that time should begin to run afresh from such revivor, as well as from a revivor where there was a change of parties. This decision was approved by the Judicial Committee of the Privy Council in *In re Blake* (3). This view is also supported by the high authority of Lord St. Leonards (Real Property Statutes, 123) and Mr. Pridgeaux (Judgments 57). We are not unmindful however that even in Ireland a question has been raised as to effect of the procedure substituted for the writ of revivor by the Rules of the Supreme Court (Ir.) 1891 Ord. XLII, Rules 24-25, which correspond with the English Rules of the Supreme Court 1883, Ord. XLII, Rules 22 and 23. With reference to this procedure, which corresponds with what is laid down in section 248 of the Code of Civil Procedure of 1882, Mr. Justice O'Brien raised the question in *Evans v. O'Donnell* (4) whether an order for leave to issue execution under the Judicature Act would have the effect that was ascribed to a revivor by the House of Lords in *Farran v. Beresford* (5). But no reasons were assigned by the learned Judge in support of his opinion that the force of the Judicature Act would be held to deprive such an order of all efficacy as a means of making time run afresh. We are however here free from any such possible difficulty. We are called upon to construe Art. 180 of the second schedule of the Limitation Act and to determine the meaning and scope of the term revivor of

(1) (1844) 11 Cl. and F. 702.

(3) (1853) 2 Ir. Ch. Rep. 643.

(2) (1848) 2 Ir. Ch. Rep. 645.

(4) (1885) 16 L. R. Ir. 445, 452.

(5) (1842) 10 Cl. & F. 219.

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judgment used therein. When we look to the history of the legislation on the subject, we find it difficult to resist the conclusion that the Legislaturo must have intended by "revivor of judgment" the procedure prescribed in section 248 of the Code of Civil Procedure of 1882. With all deference to the opinion of Mr. Justice Wilson in *Tincourie Datta v. Debendro Nath Mookerjee* (1), an opinion which is no doubt entitled to great weight, we are consequently not prepared to share the doubt expressed by that learned Judge. We observe that no reasons are stated in support of the doubt expressed, and the learned vakil for the appellant has not been able to assign any substantial reason in support of that view. An analysis of the nature of the writ of *scire facias* or of the writ of revivor shows conclusively that a proceeding under section 248 of the Code of Civil Procedure of 1882 is in its essence and result identical for our present purposes with the former. We must, therefore, uphold the view taken in the case of *Ashutosh Dutt v. Doorga Churn Chatterjee* (2) as well founded, and we are not prepared to dissent from the series of decisions in which that view has been approved and followed. It may be added that there are other weighty reasons in support of the view taken by us. The case of *Ashutosh Dutt v. Doorga Charan Chatterjee* (2) was decided so far back as 1880, shortly after the Limitation Act of 1877 had come into operation. Since then, and in spite of the doubt expressed by Mr. Justice Wilson, the Legislaturo has not intervened. On the other hand, we find from the new Limitation Act (IX of 1908) which consolidates and amends the law on the subject, that the provisions of Article 180 are reproduced as Article 183 without any alteration. The inference seems irresistible that the judicial interpretation of Article 180 to which we have referred, correctly represented the intention of the Legislaturo. It is a well settled principle of construction that the Legislaturo is presumed to know not only the general principles of law but the construction which the Courts have put upon particular statutes. In the words of Lord Campbell C. J. in *Mansell v.*

(1) (1890) I. L. R. 17 Calc. 491.

(2) (1880) I. L. R. 6 Calc. 504

fact that an application has been made for execution of a decree and notices have been issued under sections 232 and 248 of the Code, does not operate as revivor within the meaning of Article 180. In the case before us, there was an order for execution, and the decision relied upon is on this ground obviously distinguishable.

It may be contended, however, that the application is barred under section 230, Code of Civil Procedure, which provides that where an application to execute a decree for payment of money has been made under that section and granted, no subsequent application to execute the same decree shall be granted after the expiration of 12 years from the date of the decree sought to be enforced. In the present case, as already stated, the decree was made on the 16th December 1891 and an order for execution under section 230 was made in the first execution proceeding of 1892 as also in the second execution proceeding of 1897. It may therefore be argued with some plausibility that, if Article 180 saves the execution from limitation, section 230 presents an effective bar. There is no substance, however, in this objection, for as was pointed out in the cases of *Mayabhai Prembhai v. Tribhuvandas Jagjivandas* (1) *Ganapathi v. Balasundara* (2) and *Fatleh Narain Chowdhry v. Chundrabati Chowdhraim* (3), section 230 ought not to be so construed as to make it conflict with the provisions of Article 180 of the Limitation Act. What was ruled in these cases was that the provisions of the two Acts ought not to be so interpreted as to contradict each other, and that, therefore, section 230 cannot be taken to limit Article 180. It is worthy of notice that this interpretation has subsequently received the sanction of the Legislature, and in the Code of Civil Procedure of 1908, section 48, which replaces the 3rd and 4th paragraphs of section 230 of the Code of 1882, expressly provides that nothing in that section shall be deemed to limit or otherwise affect the operation of Article 180 of the second schedule of the Indian Limitation Act. Statutory authority has, therefore, been given to the

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(1) (1881) I. L. R. 6 Bom. 258. (2) (1884) I. L. R. 7 Mad. 540.

(3) (1892) I. L. R. 20 Calc. 651.

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rulings which declared Article 150 of the Limitation Act to be independent of section 230 of the Code of Civil Procedure of 1882, and, upon the principles of construction which we have already explained, the inference is irresistible that these decisions accurately interpreted the intention of the Legislature. It follows consequently that the second ground taken on behalf of the appellant must be overruled from every possible point of view.

The third ground taken on behalf of the appellant raises a purely technical objection of an entirely unsubstantial character. It is argued that upon the death of one of the judgment-creditors Balkissen, an application for substitution ought to have been made to the Original Side of this Court which passed the decree, and that, in the absence of an order from this Court, the District Court to which the decree had been transferred for execution had no authority to proceed with the execution at the instance of the other judgment-creditors, one of whom had obtained by survivorship the interest of the deceased creditor. An examination of the provisions of the Code makes it obvious that there is no foundation for this contention. The Civil Procedure Code does not expressly provide for an application for substitution under circumstances like these. There is no provision which renders necessary the actual substitution of the name of the legal representative for the validity of the proceedings in execution. Section 232 merely requires that the legal representative should apply for execution of the decree, and that his name should be brought on the record: *Syed Nadir Hossein v. Baboo Pearoo Thovildarinee* (1), *Balkishoon v. Mahomed Tamaz Allee* (2). This provision was substantially complied with in the case before us. The surviving decree-holders in their application to this Court for transfer of the decree stated that the creditor Balkissen Das was dead and that Sham Das, one of the other execution-creditors, was his legal representative. The application further contained a prayer that Shyam Das and Mathura Das, the two surviving execution-creditors, might be allowed to obtain a transfer of the decree to the Court of the

(1) (1873) 19 W. R. 235.

(2) (1872) 4 All. H. C. 90.

District Judge of Hooghly for execution. Upon notice to the judgment-debtor and without any objection, the order for transfer was made. In our opinion it was not necessary for the decree-holders to make a formal application for substitution in the Court of the District Judge as they did; they were quite competent to carry on the execution without any such application. The third objection, therefore, cannot be supported and must be overruled.

The fourth ground taken on behalf of the appellant raises a question of estoppel. It is contended that by reason of the negligence of the present respondents, who had attached a decree in which the judgment-debtor was the decree-holder, his rights under the decree have been extinguished by limitation, and therefore the respondents are not entitled to proceed with execution till at any rate they have indemnified the appellant for the damage which he had sustained. No such objection, however, was taken in the Court below and there are no materials upon the record upon which this question can be determined. Apart, therefore, from the question, whether an objection of this character is maintainable in execution proceedings, we must decline to entertain it on the ground that it had not been taken at an earlier stage of the proceedings. The fourth ground of objection also must therefore be overruled.

The result is that none of the grounds upon which the decision of the Subordinate Judge is challenged can be maintained. The appeals, therefore, fail and must be dismissed with costs.

Appeals dismissed.

S. M.

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CRIMINAL REVISION.

Before Mr. Justice Holmrood and Mr. Justice Ryves.

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Jan. 21.

SALT

v.

EMPEROR.*

Witness—Statement of witness taken by the police during the investigation and recorded in the Special Diary—Copies of such statements when to be given to the accused—Criminal Procedure Code (Act V of 1898), ss. 161 and 162—Practice.

Where the trying Magistrate, at the instance of the accused, called for the statements of certain prosecution witnesses recorded by the police during their investigation in the special diary and then returned them to the police without recording an order that he did not think it expedient in the interests of justice to furnish the accused with a copy, and also disallowed an application to summon a defence witness:—

Held, that the Sessions Judge should re-hear the appeal and examine this witness, and send for the statements recorded by the police and, if he found anything in them of advantage to the accused, that he should also summon the witnesses who made them and allow cross-examination after supplying the accused with a copy of their statements.

THE petitioner, who was a Claims Inspector on the Eastern Bengal State Railway, was charged with criminal breach of trust as a servant under section 408 of the Indian Penal Code, and convicted by the Joint Magistrate of Alipore, on the 14th September 1908, and sentenced to three months' rigorous imprisonment and a fine of Rs. 500. In September 1907 the petitioner was deputed by the Railway Company to Goalundo where, it was alleged, he sold 180 bags of damaged rice to one Buldeo Thakur and received a *hundi* for Rs. 1,320 which he cashed in Calcutta, and of this sum he credited Rs. 820 to the Railway Company and misappropriated the balance. The trial commenced on the 3rd August 1908 upon further inquiry directed by the District Magistrate of Alipore, and on that day six prosecution witnesses were examined. The

* Criminal Revision No. 1378 of 1908, against the order of F. R. Roe, Sessions Judge of the 24-Parganas, dated Nov. 30, 1908.

case was next taken up on the 10th instant and four more prosecution witnesses were examined and four cross-examined. On the 21st, the other prosecution witnesses were cross-examined and a charge framed. The investigating police officer was then cross-examined by the defence, and admitted that statements of certain of the prosecution witnesses had been taken down in writing and were entered in the special diary. At the close of his cross-examination the counsel for the accused made a verbal application to the Magistrate for the production of these statements. The Magistrate, thereupon, ordered the police to produce the statements of these witnesses on the 1st September, on which date he passed the following order: "The statements called for by the defence from the Sealdah Police have been produced before me. They in no way contradict the evidence given, and I return them."

The accused had also applied to the Magistrate to summon Mr. Hardless, the Government hand-writing expert, to prove that the signature of his name on the *hundi* was not in his hand-writing, but the Magistrate refused the application.

The Court then proceeded with the case and the defence witnesses were examined, and the accused was ultimately convicted and sentenced. On appeal, the learned Sessions Judge of Alipore upheld the conviction but reduced the sentence. The petitioner then moved the High Court and obtained the present Rule.

Mr. Norton, Mr. Mehta and Babu Manmatha Nath Mukerji, for the petitioner.

The Deputy Legal Remembrancer (Mr. Orr), for the Crown.

HOLMWOOD AND RYVES JJ. We are of opinion that the best way of dealing with this Rule will be to direct that the learned Sessions Judge who heard the appeal should reconsider it after re-hearing counsel and examining Mr. Hardless as a witness. At the same time, as the petitioner has taken the ground that the statements before the police, whether contained in a special diary or in a diary under section 161

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of the Criminal Procedure Code, of Tilak Chand Borad and of Tilak Chand, were sent for but no order was passed stating that the Court did not think it expedient in the interests of justice to furnish him with a copy, we think that the learned Sessions Judge should himself send for and consider the statements of these two witnesses and, if he finds that there is anything in them upon which the petitioner would be advantaged by being allowed to cross-examine thereon, he should also re-summon those witnesses and submit them for cross-examination after supplying copies of their statements to the petitioner.

We, therefore, make the Rule absolute in these terms, and remit the case to the same learned Sessions Judge of Alipore for re-hearing the appeal.

The petitioner will remain on the same bail.

Rule absolute.

J. N. M.

CRIMINAL REFERENCE.

Before Mr. Justice Carnduff and Mr. Justice Doss.

1909
Feb. 12.

SALIGRAM SINGH

v.

EMPEROR.*

Surety bond—Liability of Surety on forfeiture of bond by Principal—Recovery of amounts of the bonds from both Principal and Surety—Criminal Procedure Code (Act V of 1908), s. 514 and Sch. V, Form XI.

Upon the forfeiture of a bond by a person to keep the peace for a term, the surety is liable to pay the amount specified in his bond in addition to the penalty paid by the principal.

Emperor v. Nga Kaung (1) dissented from.

The object of requiring a surety to such a bond is not to ensure the recovery of the amount of the bond from the principal, but to serve as an additional security for his keeping the peace.

Queen-Empress v. Rakim Baksh (2) referred to.

* Criminal Reference No. 234 of 1909, by C. W. E. Pittar, Sessions Judge of Patna, dated Nov. 27, 1909.

(1) (1903) U. B. R. 31;

(2) (1899) L. L. R. 20 All 206.

2 Cr. L. J. Ind. 463.

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IN a proceeding under section 107 of the Code of Criminal Procedure, 1898, one Saligram Singh was bound down, in the sum of Rs. 100, to keep the peace for one year, and the petitioner, Kuldip Singh, bound himself as surety, in the sum of Rs. 50, that the former would not commit a breach of the peace or do any act that might probably occasion a breach of the peace during the term of the bond, and that, in case of his (Saligram's) making default therein, he (Kuldip) would forfeit to His Majesty the sum of Rs. 50. Saligram's bond was declared to be forfeited by the Sub-divisional Officer of Dinapore, on the 9th September, 1908, and both the petitioners were ordered to pay the amounts of their respective bonds. They appealed against the order to the District Magistrate who summarily rejected the appeal, on the 24th September, under section 515 of the Criminal Procedure Code, without considering the objection of the petitioner, Kuldip, that the lower Court was wrong in requiring a double penalty, Saligram having paid the amount of his bond.

The Sessions Judge of Patna, by his letter dated the 27th November, referred the case to the High Court under section 438 of the Code, recommending the reversal of the order of the District Magistrate on the ground that the point raised by Kuldip was worthy of consideration, and had not been dealt with by the Appellate Court. He referred to *Emperor v. Nga Kaung* (1).

No one appeared in the case.

CARNDUFF AND DOSS JJ. This is a reference made by the Sessions Judge of Patna which raises the question of the extent of the liability of a person who has stood surety for another bound down to keep the peace. It appears that one Saligram Singh was required by the Sub-divisional Magistrate of Dinapore to execute a bond for Rs. 100 under section 107 of the Code of Criminal Procedure, and that the petitioner, Kuldip, stood as his surety in the sum of Rs. 50. The bond was declared forfeit by the Sub-divisional Magistrate, who

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ordered the principal and the surety to pay the sums of Rs. 100 and Rs. 50 respectively. Against this order an appeal was preferred before the District Magistrate under section 515 of the Code, and was summarily rejected. One of the grounds taken on the appeal was that the Sub-divisional Magistrate was wrong in inflicting a "double penalty," the contention being that, as the principal had paid, there ought to have been no realisation from the surety. The learned Sessions Judge has recommended that the District Magistrate's order be set aside on the ground that he has not considered the point above stated. He has himself refrained from expressing any opinion upon it, but has referred to the decision in the case of *Emperor v. Nga Kaung* (1) which appears to have been decided in Upper Burma in 1905.

Prima facie, no doubt, a surety merely agrees to pay the creditor failing the debtor, and his liability is, as a rule, co-extensive with that of the principal. But this is not a case of ordinary suretyship for the payment of money. As pointed out by Edge, C.J., in *Queen-Empress v. Rahim Bakhsh* (2), the object of these provisions of the Code is to prevent crime, and not to obtain money for the Crown. It is not, as in the case of, for example, an administration bond with sureties, the object to secure the payment of money or the avoidance of pecuniary loss. Hence it is provided in section 118 of the Code that the amount of every bond demanded under these provisions shall be fixed with due regard to the circumstances of the case and shall not be excessive, while in section 106 it is expressly directed that the amount of the principal bond shall be proportionate to the means of the person bound down. That being so, it is obvious that the power to require sureties must have been given with some object other than that of ensuring the recovery of the amount of the bond; in other words, an additional security for the principal's keeping the peace, not a surety for his paying forfeit, is demandable.

(1) (1905) U. B. R. 31 ;

(2) (1898) I. L. R. 20 All. 204;

2 Cr. L. J. Ind. 463. .

This view is supported by the form of the bond actually executed in this instance. Saligram Singh "bound himself not to commit a breach of the peace or do any act that might probably occasion a breach of the peace during the term of one year," and, "in case of his making default therein," to "forfeit to His Majesty the sum of Rs 100." The petitioner, Kuldip, next "bound himself surety for Saligram Singh that he (Saligram) should not commit a breach of the peace or do any act that might probably occasion a breach of the peace during the said term, and, in case of his (Saligram's) making default therein, to forfeit to His Majesty the sum of Rs. 50." This is the form set forth as Form XI in the Fifth Schedule to the Code, and from its terms it seems to us to be clear that Kuldip bound himself to forfeit Rs. 50 in the event of Saligram's failing to keep the peace during the period fixed.

The conclusion at which we have arrived, therefore, is that the Sub-divisional Magistrate was right; and, in these circumstances, we think it unnecessary to send the case back for disposal by the District Magistrate as the first appellate authority. In the result, then, we decline to interfere.

E " M.

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APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Carnduff.

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Feb. 12.

DHANU RAM MAHTO

v.

MURLI MAHTO.*

Commission—Practice—Evidence taken on commission, when evidence in suit—Practice on the Original Side of the High Court and the Mofussil Courts—When Court may grant time and adjourn Hearing—Costs of Adjournment—Civil Procedure Code (Act XIV of 1882), ss. 156, 339, 390.

Where a commission was duly executed and returned together with the evidence taken under it to the Court which issued it and formed part of the record of the case under s. 339 of the Civil Procedure Code (Act XIV of 1882), and where the circumstances mentioned in s. 390 of the Code, which would exclude the deposition from being read as evidence in the suit, do not exist

Held, that regard being had to the practice of the mofussil Courts, which is not only perfectly consistent but also in strict accordance with the provisions of the Civil Procedure Code, it is not necessary to tender the evidence taken on commission formally at a trial, to make it evidence in the case.

Man Gobinda Choudhuri v. Shashendra Chandra Choudhuri (1) followed.

Duttala Nath Dutt v. Gunga Dutt (2), *Nistarin Dassee v. Nundo Lal Bose* (3), *Kusum Kumari Roy v. Satya Ranjan Das* (4) and *Struthers v. Wheeler* (5) referred to.

Where the Court made an order for adjournment conditional upon the immediate payment of costs:—

Held, that although s. 156 of the Civil Procedure Code (Act XIV of 1882) gives the Court ample discretion as to the particular directions to be given in the matter of costs, an order ought not to be made conditional upon immediate payment of costs, without sufficient opportunity being given to the plaintiff to enable him to carry out the orders of the Court and to produce his evidence.

* Appeal from Appellate Decree No. 1332 of 1907, against the decree of H. E. Ransom, District Judge of Darbhanga, dated April 3, 1907, affirming the decree of Ambica Charan Dutt, Subordinate Judge of that District, dated Feb. 6, 1907.

(1) (1907) I. L. R. 35 Calc. 28.

(3) (1893) I. L. R. 28 Calc. 591.

(2) (1872) 8 B. L. R. App. 102.

(4) (1903) I. L. R. 30 Calc. 999, 1003.

(5) (1880) 6 C. L. R. 109.

SECOND APPEAL by the plaintiff, Dhanu Ram Mahto.

The plaintiff brought the suit for declaration of his title to certain immoveable property, and for an injunction to stay the sale of the said property.

The defence was that the claim was false and collusive. One witness was examined on commission on behalf of the plaintiff.

On the case coming on for hearing, the plaintiff through his pleader applied for time to bring up his witnesses who were not present. The Subordinate Judge granted the adjournment on condition that the cost of the day was paid by the plaintiff to the defendant. The plaintiff being unable to deposit the cost, the Subordinate Judge dismissed the suit without adjudicating on the merits.

The plaintiff appealed to the District Judge who dismissed the appeal on the ground that it was too late to ask the Court to consider the evidence taken on commission which was not tendered though the plaintiff had ample opportunity to do so, and that the learned Subordinate Judge had not omitted to consider anything material.

The plaintiff, thereupon, appealed to the High Court

Babu Shorashi Charan Mitra, for the appellant Under sections 389 and 390 of the Civil Procedure Code and the practice that had grown up in the mofussil Courts, it was not necessary to tender the deposition of a witness examined on commission, but that it formed a part of the record and could be used as evidence in the case *Dwarkanath v Gunga Dayi* (1), *Struthers v. Wheeler* (2), *Nistarani Dassie v Nundo Lal Bose* (3) Under section 156 of the Civil Procedure Code the Subordinate Judge could not make the order for adjournment conditional upon the immediate payment of costs.

Babu Digambar Chatterjee, for the respondent. Evidence taken on commission cannot be used in evidence in the case

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(1) (1872) 8 B. L. R. App. 102.

(2) (1882) 6 C. L. R. 172.

(3) (1879) L. L. R. 26 Cal. 591.

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until tendered by the party at whose instance the commission has been taken out: *Kusum Kumari Roy v. Satya Runjan Das* (1), *Hemanta Kumari v. Banku Behari Sikdar* (2).

The Court has ample discretion to impose the payment of costs, conditional upon adjournment of a case under section 156 of the Code of Civil Procedure.

Cur. adv. vult.

MOOKERJEE AND CARNDUFF JJ. The plaintiff appellant commenced the action out of which the present appeal arises for declaration of his title to immoveable property and to restrain the defendants from enforcing a mortgage which they claimed to hold thereupon. The suit was instituted so far back as the 18th May 1903 and up to the present time it has not been heard on the merits. The plaintiff had at one stage of the suit obtained an order for the examination of a witness upon commission. That witness was duly examined, and the Commissioner made his return. When the case came on for trial before the Subordinate Judge, the evidence taken on commission was on the record, but as the witnesses who were to be examined in Court were not in attendance, an application was made on behalf of the plaintiff for adjournment. The Subordinate Judge made the grant of the application conditional upon the immediate payment of the costs of the defendant. The plaintiff was unable to carry out the order of the Court and the suit was dismissed. An appeal was then preferred to the District Judge, but it was dismissed by him under section 551 of the Code of Civil Procedure. The plaintiff has now appealed to this Court and on his behalf the decision of the Court below has been challenged on two grounds, namely, *first*, that as the evidence taken on commission was on the record, the suit ought not to have been dismissed without an adjudication on the merits; and, *secondly*, that the Court of first instance ought to have allowed him an opportunity to produce his other evidence. In answer to the first contention,

(1) (1903) I. L. R. 30 Calc. 939, 1003. (2) (1905) 9 C. W. N. 794.

it has been argued by the learned vakil for the respondent that as the plaintiff did not tender the deposition in evidence, the Subordinate Judge was not bound to consider it; and in answer to the second contention it has been suggested that the plaintiff was guilty of laches and was not entitled to any consideration from the Court.

In support of the first contention, reliance has been placed on behalf of the appellant upon the decision of this Court in *Dwarka Nath Dutt v. Gunga Dayi* (1), *Struthers v. Wheeler* (2), and *Nistarini Dassee v. Nundo Lall Bose* (3) which show that in order to make a deposition taken on commission available for purposes of the trial, it is not necessary formally to tender it in evidence. On the other hand, in support of the contention of the respondent, reliance has been placed upon the cases of *Kusum Kumari Roy v. Satya Runjan Das* (4) and *Hemanta Kumar v. Banku Behari Sikdar* (5), in which it was ruled that the deposition of a witness examined on commission does not become evidence in the suit until the same has been tendered and read as evidence by the party on whose behalf it has been taken. We observe that in the cases upon which reliance is placed on behalf of the respondent, the view of the Court was based upon the practice which has prevailed for many years past on the Original Side of this Court. On the other hand, as was pointed out by this Court in the case of *Man Gobindo Choudhuri v. Shashindra Chandra Choudhuri* (6), the practice in the mofussil Courts has been precisely in the opposite direction. There can be no doubt that in the mofussil Courts the deposition of a witness examined on commission is treated as evidence in the case even though it has not been formally tendered. In our opinion, this practice is not only perfectly consistent, but also in strict accordance with the provisions of the Code on the subject. Section 389 of the Code of 1882 provides that after the commission has been duly executed it shall be returned together with the evidence taken

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(1) (1872) 5 B. L. R. App. 102.

(2) (1880) 6 C. L. R. 109.

(3) (1899) I. L. R. 26 Calc. 591.

(4) (1903) I. L. R. 30 Calc. 999, 1003.

(5) (1905) 9 C. W. N. 794.

(6) (1907) I. L. R. 35 Calc. 28.

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under it to the Court from which it issued, and the commission, the return thereto and the evidence taken under it form, subject to the provisions of section 390, part of the record of the suit. Section 390 to which reference is made then provides that evidence taken on commission shall not be read as evidence in the suit without the consent of the party against whom the same is offered unless the person who gave the evidence is beyond the jurisdiction of the Court or dead or unable from sickness or infirmity to attend to be personally examined or exempted from personal appearance in Court, or the Court in its discretion dispenses with the proof of any of the circumstances just mentioned and authorizes the evidence of any person being read as evidence in the suit notwithstanding proof that the cause for taking such evidence by commission has ceased at the time of reading the same. Where, therefore, as in the case before us, the circumstances mentioned in section 390 which would exclude the deposition from being read as evidence in the suit do not exist, there is no reason why the deposition should be formally tendered before it can be treated as evidence in the cause. No doubt, it may be plausibly suggested, as indeed it has been suggested by some writers, that the mere fact that the deposition forms part of the record does not make it evidence, because every thing that is on the record may not be evidence in the suit till it has been made evidence in the manner contemplated by law. That may be so but the analogy has no application to the case before us. Here the deposition has been taken by a duly authorized commissioner; the parties had the opportunity to appear and examine and cross-examine the witness as contemplated by law. There is no suggestion that the commission has not been duly executed and returned; nor is there any room for suggestion that circumstances may exist which would exclude the deposition from being used as evidence under section 390. Under circumstances like these, it would be, in our opinion, an idle formality, not contemplated by the Code to require that the deposition must be formally tendered in evidence. The practice of the mofussil Courts as pointed out in the case of *Man Gobindo Chowdhuri v. Shashindra Chandra*

Chowdhuri (1) is entirely consistent with the provisions of the Code, and there is no reason why we should substitute for it a practice which has grown up in the Original Side of this Court. We do not think, it can rightly be suggested that there is anything on principle which makes it obligatory upon a party to tender a deposition formally at the trial. No doubt, if, as is provided in the English Rules of the Supreme Court, 1883, Order 37, Rule 24, there were any statutory rule that notice of intention to use a deposition at the trial should be given, the practice must be regulated accordingly. But in the absence of any similar provision in our Code of Procedure, we do not see why we should insist upon this formality. The deposition forms part of the record and either party may use it. If the opponent of the party who relies on the deposition has any objection to its admissibility, it is open to him to urge that point. But we do not see that there is upon principle any necessity to tender the deposition in evidence. That there is no real question of principle involved in the matter, would appear from the circumstance that under other systems of law, the practice which is followed in our mofussil Courts has been adopted; for instance, in the American Federal Courts, it is not necessary for a deposition duly taken on commission to be tendered in evidence; it is treated as already part of the record and may be used at once by either party: *Andrews v. Graves* (2), *Park v. Willis* (3). In our opinion, we ought to adhere to the practice which prevails in the mofussil Courts, and according to that practice, there is no question that the deposition in this case ought to have been considered by the Subordinate Judge. The first point taken on behalf of the appellant must consequently prevail.

As regards the second point taken on behalf of the appellant, it is contended that under section 156 of the Code of 1882, it was not open to the Subordinate Judge to make the order for adjournment conditional upon the immediate payment

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(1) (1907) L. L. R. 35 Calc. 28

(2) (1870) 1 Dillon 108;

1 Fed. Cases 894.

(3) (1806) 1 Cranch C. C. 357;

18 Fed Cases 1108.

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of costs. It is suggested that if in the opinion of the Subordinate Judge, an adjournment was necessary in the interests of justice, the object of the grant of an adjournment ought not to have been defeated by the imposition of an order for costs, inability to comply with which would nullify the very object which the Court had in view. In our opinion, there is no foundation for the broad contention that the Court could not make an appropriate order for costs; the second paragraph of section 156 clearly gives the Court ample discretion as to the particular directions to be given in the matter of costs occasioned by the adjournment. At the same time, we are of opinion that in the circumstances of this case, the Court might have adjourned the case to a subsequent date and made the hearing on that date conditional upon the payment of costs before that date. Such an order would have enabled the plaintiff or his legal adviser to comply with the order for costs. We are of opinion, therefore, that sufficient opportunity was not given to the plaintiff to enable him to carry out the order of the Court and to produce his evidence.

The result is that this appeal must be allowed, the decrees made by the Courts below discharged and the case remitted to the Court of first instance to be tried on the merits. Both parties will be at liberty to adduce evidence in support of their respective claims.

As regards the costs of this appeal, they must abide the result, but there will be no order for costs in the lower Appellate Court. The costs in the Court of first instance up to this stage as also after the remand will be in the discretion of that Court.

*Appeal allowed ;
case remanded.*

APPELLATE CRIMINAL.

Before Mr. Justice Casper and Mr. Justice Byrne.

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Cheating—Evidence—Obtaining by false representation money as pretended security for appointments of office—Admissibility of proof of previous and subsequent similar but unconnected transactions as evidence of dishonest intention on the occasion in question—Part of a systematic series of similar fraudulent transactions—Evidence Act (1 of 1872), ss. 14, Expt. (1), Illus. (a); 15, Illus. (a).

On a charge against the accused of cheating by falsely representing that he was the owner of an estate and could procure for the complainant appointment to the vacant post of manager to the estate, and thereby obtaining a sum of money as a pretended security deposit, evidence of instances of similar but unconnected transactions with other persons, before and after the date of the offence charged, is admissible, under ss. 14 and 15 of the Evidence Act, not to establish the *factum* of the offence but to prove that the transaction in issue was one of a systematic series of frauds, and that the intention of the accused on the particular occasion in question was dishonest and fraudulent.

Explanation (1) and Illus. (a) to s. 14 of the Evidence Act render facts showing the existence of a state of mind relevant only if they establish that such state of mind existed in reference to the particular matter in issue.

Section 15 is an application of the general rule laid down in s. 14, and the words of the section as well as of Illus. (a) show that it is not necessary that all the acts should form parts of one transaction, but that they should be parts of a series of similar occurrences.

Reg. v. Holt (1) discussed and distinguished.

Queen v. Francis (2), *Reg. v. Rhodes* (3), *Reg. v. Ollis* (4), *Reg. v. Wyatt* (5), *Reg. v. Bond* (6), *Makin v. Att.-Gen. for New South Wales* (7) and *Queen-Empress v. Vajiram* (8) followed.

On the 26th January 1908 the accused, who was travelling by train on the B. and N.-W. Railway, sent for and

* Government Appeal No. 2 of 1909, against the order of acquittal by the Sessions Judge of Darbhanga, dated July 23, 1908.

(1) (1860) Bell C. C. 280.

(5) [1904] 1 K. B. 188.

(2) (1874) L. R. 2 C. C. R. 128.

(6) [1906] 2 K. B. 389.

(3) [1899] 1 Q. B. 77.

(7) [1894] A. C. 57.

(4) [1900] 2 Q. B. 758.

(8) (1892) 1 L. R. 16 Bom. 414.

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entered into a conversation at Bazidpore station with one Boodrio, the guard of the train, and, representing himself to be the *dewan* of the Narhan Raj, informed him that the post of manager to the estate, on a monthly salary of Rs. 300, was vacant, but that a security deposit of Rs. 1,600 was required, and asked him if he knew of any one with suitable qualifications for the post. Boodrio replied that he possessed some experience of zemindari work and would like to obtain the appointment himself, but that he was unable to furnish the necessary amount of security. The conversation was renewed when the train stopped at Sonapore station, and Boodrio intimated his ability to give Rs. 70 as security which the accused accepted as more was not available. On the next day Boodrio sent the accused the amount by money order to his address at Bankipore which was duly received and acknowledged by him by letter. Some correspondence then passed between the parties on the subject, and an interview was arranged by the accused at the Hajipur *daik* bungalow at which Boodrio was informed that the Raja was willing to accept Rs. 100 as security, and the balance Rs. 30 was accordingly remitted by him, on the 14th February, to the accused who acknowledged its receipt. Subsequently, Boodrio became suspicious on over-hearing a conversation between Mahboob Hossain, the assistant station-master of Patori, and the signaller there, and he learnt that the accused had also attempted to obtain money from Mahboob on similar representations, and informed the police on the 23rd March. It was proved that the accused was in no way connected with the Narhan estate at the time, though he had, some two or three years before, been *dewan* to the estate for a short period. The estate was at the time of the present occurrence under the Court of Wards, and there was no post of manager or any other post with a salary of Rs. 300 vacant.

At the trial the Magistrate admitted evidence of similar but unconnected instances of obtaining or attempting to obtain money from other Railway employees on the following occasions:—

(i) At the end of January or the beginning of February 1907, the accused told Abhoy Chundra Ghose, station-master

of Kishunpore, that he was employed as manager to the estate of Rai Durga Prosad, that a post as tehsildar to the estate, on Rs. 50 a month, was vacant and that he could obtain it for Ahhoy's son on receipt of a security deposit of Rs. 300, which amount was sent to him. As his son did not get the post, Ahhoy wrote several times to the accused demanding the return of his money, and ultimately sent him a pleader's letter threatening with a criminal prosecution, whereupon he returned Rs. 200.

(ii) At the end of February or the beginning of March 1907, the accused told Gideon, carriage examiner at Samastipur, that he was head manager of the Darbhanga Raj, and could procure his appointment as sub-manager, on a salary of Rs. 300 *per* month, on his furnishing a security deposit of Rs. 500 in advance. Gideon consulted a pleader and was advised not to send the money before obtaining the appointment.

(iii) Towards the end of February 1908, the accused represented to Mahboob Hossain, assistant station-master of Patori, that he was the manager of the Tikari Raj and could obtain for him a tehsildarship, on a monthly salary of Rs. 50, on his depositing Rs. 300 as security. The application was written out then and there and was to have been submitted with the security to the accused, but Mahhoob, while conversing with a signaller on the subject, was over-heard by Boodrie who then informed him of the offer made to him of the appointment of manager to the Narhan Raj, and Mahhoob was dissuaded from sending any money.

In each of these cases it was proved that the accused was in no way connected at the time with the estates mentioned by him and that no such appointments as alleged were then vacant.

The defence story, as set up by one Dinesh Prosad for the accused but not by the latter himself in any statement, was that Dinesh, who was the manager of the Fatehpore Dularpore estate, wanted a sub-manager on Rs. 75 *per mensem* with a security deposit of Rs. 1,000, and the accused remitted him the sum received from Boodrie by messenger as part payment of the security for the post. Dinesh subsequently, it was alleged, sent for Boodrie through the accused in connection with the

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appointment, but he failed to appear and Dinesh, thereupon, retained the sum advanced by him.

The accused was convicted under section 420 of the Penal Code, and sentenced by the Magistrate, on 3rd July 1908, to four months' rigorous imprisonment and a fine of Rs. 300 and in default to a further term of three months' imprisonment. On appeal, the Sessions Judge of Darbhanga acquitted him by his order, dated the 23rd July 1908, holding that the direct evidence in support of the charge as to the occurrence of the 26th January 1908 standing alone insufficient, and that the evidence relating to similar instances of cheating or attempting to cheat was not admissible. The Bengal Government thereupon instituted the present appeal.

The Advocate-General (Hon'ble Mr. Sinha) with the Deputy Legal Remembrancer (Mr. Orr), for the Crown. Evidence of similar acts of cheating are not admissible to prove whether, as a matter of fact, the accused made the representations alleged to Boedrie and induced him to part with the 100 Rupees. This has been amply proved by other evidence in the case. But such evidence is admissible, under sections 14 and 15 of the Evidence Act, to rebut the defence that the transaction was *bona fide* and not fraudulent by showing that both previously and shortly after the accused had similar transactions with others, which, taken together, showed dishonest intention on his part, and also that the present case was one of a series of fraudulent transactions similar in character. The English decisions establish this rule: *Queen v. Francis* (1), *Regina v. Rhodes* (2), *Regina v. Ollis* (3). There are two recent cases on the point: *Rex v. Wyatt* (4) and *Rex v. Bond* (5). See also *Queen-Empress v. Vajiram* (6).

Mr. Hug (Mr. Lall, Babu Dwarka Nath Mitter and Babu Kulwant Sahai with him), for the accused. Section 15 is not applicable as there is no question here of accident or mistake.

(1) (1874) L. R. 2 C. C. R. 123.

(2) [1899] 1 Q. B. 77.

(3) [1900] 2 Q. B. 738.

(4) [1904] 1 K. B. 188.

(5) [1906] 2 K. B. 339.

(6) (1892) I. L. R. 16 Bom. 414.

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the post for himself, but stated that he would be quite unable to give the security of Rs. 1,600 which, the accused said, must be given. The conversation was renewed when the train stopped at Sonapore station, where Boodrie said he could give Rs. 70 as security, and the accused agreed to accept it if more was not available. On the next day, Rs. 70 was sent to the accused by Boodrie by money-order, and the accused received the money and acknowledged it by a letter on the record. To put the matter shortly, after some correspondence, at an interview arranged at the Hajipur *dák* bungalow by the accused, Boodrie was given to understand that the Rajah was willing to accept Rs. 100 as security, and Rs. 30, to complete this sum, was, on the 14th of February, despatched to the accused, and its receipt by him has been proved. On a subsequent occasion Boodrie over-heard a conversation among some Railway men connecting the accused's name with alleged fraudulent advertisements for a manager on Rs. 300. His suspicions were aroused and he informed the police. Boodrie swears that he believed the accused's statement that he was *dewan* of the Narhan estate and was in a position to obtain for him the post of manager on Rs. 300 a month, and that it was in consequence of this that he sent the accused the sum of Rs. 100. The substantial accuracy of Boodrie's evidence as to the first conversation between him and the accused at Bazidpore station is corroborated by the statement of Nawab Thakur who was the brakesman of the same train and was with Boodrie at the time. It has also been proved that the accused at that time was not in any way connected with the Narhan estate, although there is evidence that he had some two or three years previously been *dewan* for a short time. It is also proved that the estate was then under the Court of Wards, and that there was no post of manager or other post with a salary of Rs. 300 vacant. It is admitted that the accused received the sum of Rs. 100, and that he has not repaid any portion of it though a refund had been demanded.

On these facts alone, it seems to us that the offence of cheating has been made out. In the Court of the Sub-divisional

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depositing Rs. 500 as security with him in advance. He wrote many letters to the witness subsequently on the subject, and two of them, dated the 3rd and the 9th of March 1907, respectively, are on the record informing him that the appointment would be made on the 15th of April, but that cash in advance must be sent. Gideon, however, consulted a pleader who advised him not to send the money until he obtained the appointment. He did not get the appointment, and it is proved that the accused at the time was not in any way connected with the Darbhanga estate, and it is further proved that no such appointment as he offered was vacant. Similarly the accused, in February 1908, told Mahboob Hossain, assistant station-master at Hatori, that he was employed in the Tikari Raj and could obtain for him a tehsildarship in that estate on Rs. 50 a month, and got him there and then to write out an application for the post. This was to be sent with Rs. 300 as security. The witness said that he would consult his father, and the accused replied that he would be returning the next day but one, and would then receive the application and the money. He then proceeded on his journey. While the witness was having some conversation with another railway employee on the platform, as to whether it was usual to give security before or after appointment, the conversation was overheard by Boodrie whose suspicions were aroused and communicated; and in the result the witness did not send the money. It is also proved that the accused had no connection with the Tikari Raj.

The defence of the accused is a strange one. He cross-examined the prosecution witnesses as if to show that he was in a position to obtain a managership on behalf of the Rani's private estate, and that she was desirous to be free from the Court of Wards. He himself declined to make any statement, and his story is told by his witness, Dinesh Prosad, who says that he (the witness) is manager of the Fatehpore Dularpore estate, the malik of which is one Mohunt Gulcharan Bharati. He was looking out for an assistant manager on Rs. 75 a month with Rs. 1,000 security, and he received from the accused two

remittances by a messenger of Rs. 70 and Rs. 30, as part security advanced by one J. Boodrio who was said to be an applicant for the post. The witness subsequently sent for Boodrio through the accused to meet him in connection with the appointment, but, as Boodrie had failed to come, he considered himself justified in keeping the hundred rupees, though, as he alleged himself, the appointment had been filled up by the appointment of his own younger brother. In corroboration of this story, four letters are put in, purporting to be letters written by the accused to the witness or by the witness to the accused respectively. This story has been totally disbelieved by the Sub-divisional Magistrate, and it is unnecessary to recapitulate the good reasons which he has given for his conclusion. It is exceedingly unlikely that Boodrie, who was getting Rs. 60 a month as pay and making on an average altogether about a hundred a month, including "over-time work," would throw up his appointment to undertake a post of this kind on a salary of Rs. 75. There are besides, when the letters put in on behalf of the defence are read along with the letters written by the accused to Boodrie, such obvious inconsistencies as to make us believe that the letters put in by the accused in his defence were concocted subsequently, after the Police had begun to investigate the case. None of the envelopes in which the letters would have been contained have been produced, so that there is no guarantee, by a comparison of any post-mark, that the dates which any of them purport to bear were genuine. It is also very significant that, when this witness was examined by the Police, he did not then produce the letters, although he admitted in his cross-examination that the letters were then in his office, only a few yards distant from the place where he was being examined. The witness made over these letters to the police about a week afterwards.

There is one other point in the case, namely, whether the Sub-divisional Magistrate who tried the case had jurisdiction to try it. That point, however, we need not now consider.

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The accused appealed to the learned Sessions Judge with the result which we have stated at the commencement of this judgment. We are wholly unable to appreciate the reasons given by the learned Sessions Judge for the conclusion at which he has arrived. He seems to have been impressed with difficulties in the case which we think have no existence. He makes no attempt whatever to analyse or criticize either the evidence for the prosecution or that of the defence, and has come to no finding as to whether either story is true or false. After dealing at some length with the question of jurisdiction, he says: "The direct evidence in support of the charge is very slight. I need not detail it as the Magistrate himself considers, and it is conceded on behalf of the Crown, and in my opinion quite rightly, that that evidence alone is not sufficient to sustain the charge. The case really rests on certain other evidence which, it is contended for the appellant, has been wrongly admitted." After discussing at some length whether that evidence, which related to other similar instances of cheating were admissible or not, he comes to the conclusion that it was inadmissible and excludes it from consideration. He goes on to say—"there being thus no evidence to support the charge, it follows that the charge cannot be sustained, and the conviction and sentence are set aside."

We are quite at a loss to understand how the learned Judge came to hold that the Sub-divisional Magistrate himself considered that the direct evidence in the case was insufficient to support the conviction. The only passage in the Sub-divisional Magistrate's judgment which could possibly lead to such an inference occurs in that portion of the judgment in which he discusses the relevancy of the other instances of cheating or attempts at cheating by the accused deposed to by various witnesses. He says "I have decided to admit the evidence (re the other alleged frauds), and based my decision" (i.e., to admit it) "not merely on that same section of the Evidence Act on which the defence rely, section 14, but also on section 15 of the same Act supported by various rulings. The evidence is to my mind relevant as showing the state of mind,

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amounting in this case to absence of good faith, in which the accused made his offer to Boodrio. It is also relevant under section 15 of the Act to show the intention of the accused in making that offer. Without that evidence we have merely an isolated promise by the accused to secure at no specified date an appointment which, as it happens, he is unable to give. Admit the evidence, and the offer to Boodrio stands out in its true colours." It is obvious that what the Magistrate here means to state is not his opinion that the direct evidence for the prosecution is insufficient to maintain a conviction, but that the outside evidence, if we may so call it, when admitted, negatives the assertion made on behalf of the accused that all that the prosecution story really amounts to is nothing more than that on an isolated occasion the accused promised to secure at some future unspecified date an appointment which, as it so happened, he was unable to give. It is quite clear, reading the judgment of the Sub-divisional Magistrate, that he believed the direct evidence for the prosecution and it follows, therefore, that even if he wrongly thought that, as a matter of law, the offence of cheating had not been established, the learned Sessions Judge should not, for that reason alone, have disregarded all that evidence. Nor can we understand how it could have been conceded on behalf of the Crown that that evidence was insufficient. At most, such an admission could only be regarded as one of law, and certainly does not estop the Crown from now urging, as it does, that the case is made out both by the direct evidence and by the other evidence on the record. Before us the main argument has turned on the admissibility of this outside evidence, and a large number of rulings, chiefly of the Courts in England, have been cited. Although we have come to the conclusion that the direct evidence in the case is sufficient for a conviction, we think it is necessary for us to decide the point, having regard to the arguments which have been addressed to us and, as we think, the erroneous views expressed by the learned Sessions Judge.

On behalf of the Crown it is conceded that this outside evidence cannot be admitted to prove the actual facts of the

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case, but it has been argued that satisfactory evidence *aliunde* has been given to prove the incidents and fact of the transaction between the accused and Boedrie. This outside evidence is admissible to rebut the defence set up, or which might be set up, by the accused, as foreshadowed by the cross-examination of the complainant (the fact that eventually a totally different defence was set up would seem to be immaterial), namely, that his intentions at the time were not fraudulent, by showing that, at or about the same time, both previously and subsequently, the accused had similar transactions with other persons which, taken together, shewed a dishonest intention on his part and also showed that the present transaction was only one incident in a series of fraudulent transactions all of which were similar in their nature, and might be regarded as proving a systematic series of frauds.

On behalf of the accused, it is argued on general principles that evidence of previous criminal acts is wholly irrelevant in a subsequent trial. It is further contended that the first *Explanation* to section 14 and *Illustration* (o) to that section show that section 14 is wholly inapplicable. It is argued that instances in which the accused had cheated or attempted to cheat Boedrie might be relevant but not attempts to cheat other persons.

It seems to us that the first *Explanation* to section 14 of the Indian Evidence Act only amounts to this that facts shewing the existence of any state of mind, as instanced in the section, are relevant only if they show that that state of mind exists in reference to the particular matter in issue. In other words, they are only relevant if they show in this case the state of mind of the accused in reference to the particular transaction with Boedrie. This seems clear from *Illustration* (o) where the issue at trial is whether A murdered B by shooting him. The fact that A had previously been in the habit of shooting at other persons would not render it more probable or less probable that it was A, and not somebody else, who shot B on the occasion in question. On the other hand, if it could be shown that A had on previous occasions attempted to shoot B,

that would be some evidence which might lead the Court to believe it probable that on this occasion it was A who shot B.

Great reliance has been placed on the case of *Reg. v. Holt*.⁽¹⁾ There Holt was charged for obtaining, on the 15th April, a sum of money by false pretences from one Hirst by representing that he had been authorized by Uttley to receive that sum on his behalf for goods delivered in pursuance of an order taken by Holt. On behalf of the prosecution evidence was tendered to prove that Holt, on a day not specified, but within a week from the said 15th April, had obtained from another person a sum of money by a like representation. This evidence was admitted and Holt was convicted. The Court of Crown Cases Reserved disposed of the matter in the following terms: "This conviction must be quashed. In the statement of the case submitted to us we cannot find any facts that would warrant us in saying that the evidence was admissible." No reasons whatever are given for the decision. It seemed to us, however, that this case may be distinguished on the one or the other of two grounds: (i) because the second instance of false representation proved was subsequent to the one at trial, and, therefore, might not be a reliable test of the accused's state of mind or intention on the first occasion. This objection, however, would seem to affect the weight to be attached to the evidence regarding the former transaction rather than its admissibility, and (ii), as suggested by Blackburn, J., during the argument in *Queen v. Francis* ⁽²⁾, and as apparently accepted by Bruce, J., in *Regina v. Ollis* ⁽³⁾ and Lawrence, J., in *Rex v. Bond* ⁽⁴⁾, the only question at issue was "had Holt authority or not." If Holt's criminality depended on the answer to this question in the negative, obviously, the fact that Holt had acted on one or more occasions as if he had actually received such authority would be no evidence to prove that, as a matter of fact, he had not. On the contrary, it might be an equally good argument in his defence as showing at least his *bonâ fide* belief that he had authority. The report of the case of *Reg. v. Holt* ⁽¹⁾ is so

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(1) (1860) Bell. C. C. 250.

(3) [1900] 2 Q. B. 758, 775.

(2) (1874) L. R. 2 Q. C. R. 128, 130.

(4) [1906] 2 K. B. 380, 424.

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meagre, and the judgment is so worded, that it is difficult to say what were the exact points on which the Court based its decision. There appears, however, to be force in an observation in Phipson's "Law of Evidence" (4th edition, page 162) that "the explanation of Blackburn, J., does not, however, satisfactorily explain *Regina v. Holt* (1), for there the evidence was tendered not to prove want of authority, of which evidence had been given *aliunde*, but to show that Holt's misrepresentation was made with guilty knowledge."

In *Queen v. Francis* (2), the case of *Regina v. Holt* (1), though it is mentioned and referred to by Blackburn, J., in the course of argument, is not mentioned in the judgment. This was a case in which the accused was indicted for attempting to obtain money from a pawn-broker by false pretences by alleging that a ring which he had offered to pawn was a diamond ring. His defence was that he did not know that the ring was false, that he received it to pawn from another person and believed that person's assertion that it was a diamond ring. Evidence was tendered to prove that Francis had shortly before offered other false articles to other pawn-brokers. This evidence was admitted and proof was given of three other instances in which the accused had obtained or attempted to obtain money from other pawn-brokers on false articles of jewellery. The Court of Crown Cases Reserved held that the evidence was admissible. Lord Coleridge said: "It seems clear upon principle that when the fact of the prisoner having done the thing charged is proved, and the only remaining question is whether, at the time he did it, he had guilty knowledge of the quality of his act or acted under a mistake, evidence of the class received must be admissible. It tends to show that he was pursuing a course of similar acts, and thereby it raises a presumption that he was not acting under a mistake."

In *Regina v. Rhodes* (3) the case of *Regina v. Holt* (1) was distinguished by Lord Russell in the following terms:—"There the false pretence charged was a distinct and separate trans-

(1) (1860) Bell. C. C. 250. (2) (1874) L. R. 2 C. C. R. 123.

(3) [1899] 1 Q. B. 77, 82.

action, and the fact that the prisoner had subsequently made a similar false pretence had no bearing on his guilt or innocence of the particular charge preferred. *Queen v. Francis* (1) is nearer to the present case, and, although there it is true that the transaction admitted in evidence was prior to that on which the charge was founded, yet it seems to me that the reasoning of the case will apply here." This case, it is argued by learned counsel for the defence, is distinguishable from the present case because there all the frauds were the result of one and the same advertisement and were, therefore, so closely connected with each other as to form a part of one transaction.

The next English case to which our attention has been called is *Regina v. Ollis* (2). The difficulty of reconciling the case of *Regina v. Holt* (3) with the subsequent rulings becomes apparent if the judgment of Lord Russell and of the majority of the Bench is compared with that of Bruce, J., who in concurrence with Ridley, J., dissented: see also the judgment of Bray, J., in *Rex v. Bond* (4). In that case the question was whether the accused, when he obtained money on a cheque, knew that he had not funds at the bank to meet it. To show that he had this knowledge, evidence was given to prove that, on three dates about the same time, he had obtained money on other cheques which were dishonoured. Lord Russell said: "In the opinion of the majority of the Court, and in my own opinion, it was relevant as showing a course of conduct on the part of the accused and a belief on his part that the cheques would not be met. The accused gave cheques on June 24 and 26 which were dishonoured, and finally, a further dishonoured cheque on July 6, all three cheques having been drawn on the same bank as the first dishonoured cheque was drawn upon. It is impossible to say that all these facts were not relevant as showing an intention to defraud." Bruce, J., on the other hand, said: "It is difficult to distinguish *Regina v. Holt* (3) from the present case." He goes on

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(1) (1874) L. R. 2 C. C. R. 128.

(2) [1900] 2 Q. B. 758.

(3) (1869) Bell C. C. 250.

(4) [1906] 2 K. B. 332.

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to say "In the present case there was no question of accident or mistake, the question was knowledge or no knowledge of the state of the bankers' account or of circumstances raising a belief in the mind of the prisoner respecting the state of his bankers' account;" and he held that "the successive acts of passing at different dates genuine cheques, falsely pretending that they are valid, are not necessarily successive acts of the same character, because the quality of each successive act depends upon the knowledge of the person passing the cheque, of circumstances existing at the time external to the instrument itself and varying in character from day to day."

From these cases it seems to us that the weight of authority is decidedly in favour of the view we adopt.

We, however, have traced still more recent authorities on the same side. In *Rex. v. Wyatt* (1), the accused was indicted for obtaining credit on false pretences. He hired furnished apartments from the prosecutrix and went away after three days' occupation of the premises without payment. At the trial evidence was admitted to prove that he had on several previous occasions hired apartments from various other persons and left without payment, the money being still due when he hired the rooms of the prosecutrix. Lord Alverstone, C. J., and four Justices held "this evidence was clearly admissible as tending to establish a systematic course of conduct on the part of the accused, and as negating any accident or mistake or the existence of any reasonable or honest motive," and confirmed the conviction. To the same effect is *Rex. v. Bond* (2), where Bray, J., pointed out that evidence of the kind under discussion is admissible "(i) where the prosecution seeks to prove a system or course of conduct, (ii) where the prosecution seeks to rebut a suggestion on the part of the prisoner of accident or mistake, (iii) where the prosecution seeks to prove knowledge by the prisoner of some fact."

These cases are precisely in point, and in any view we think section 14 of the Evidence Act does make the outside evidence in this case admissible. The case of *Queen-Empress v.*

(1) [1904] 1 K. B. 188.

(2) [1906] 2 K. B. 389, 414.

Vajiram (1) seems to support this view, although that case is sought to be distinguished on the ground that the various fraudulent acts were all committed with the object of evading one and the same decree, and were all done on the same day, and, therefore, as in the case of *Regina v. Rhodes* (2), formed parts of one transaction.

Section 15 of the Evidence Act is an application of the general rule laid down in section 14, and the words of the section as well as of *Illustration (a)* show that it is not necessary that all the acts should form parts of one transaction, but that such acts should form parts of a series of similar occurrences.

Our view as to the admissibility of the evidence in this case is, we think, supported by the well-known case of *Makin v. Attorney-General for New South Wales* (3).

Taking the whole evidence in the case it seems to be established that the accused attempted to obtain money from various subordinate Railway officials, who were drawing small salaries, by representing himself as the manager of an important and wealthy zemindari estate, and offering to obtain lucrative appointments for them under himself in consideration of their advancing to him a sum of money by way of security. As a matter of fact, there were no such appointments available, and, in any event, the accused could not have secured them for his nominee. The false representations in every case were of the same character and were made to persons similarly situated. We think this particular transaction with Boodrie was one of a series of similar frauds, and that, therefore, the evidence of the other frauds, was admissible in Boodrie's case to prove that the obtaining of money by accused from Boodrie was dishonest and fraudulent.

For these reasons we allow the appeal, and setting aside the order of the learned Sessions Judge restore that of the Sub-divisional Magistrate. The sentence seems to us very lenient, but, as another case against the accused is before us, we do not think it necessary to interfere with the sentence.

Appeal allowed.

(1) (1892) 1 L. R. 16 Bom. 414.

(2) [1899] 1 Q. n. 77.

(3) [1894] A. C. 57.

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to say "In the present case there was no question of accident or mistake, the question was knowledge or no knowledge of the state of the bankers' account or of circumstances raising a belief in the mind of the prisoner respecting the state of his bankers' account;" and he held that "the successive acts of passing at different dates genuine cheques, falsely pretending that they are valid, are not necessarily successive acts of the same character, because the quality of each successive act depends upon the knowledge of the person passing the cheque, of circumstances existing at the time external to the instrument itself and varying in character from day to day."

From these cases it seems to us that the weight of authority is decidedly in favour of the view we adopt.

We, however, have traced still more recent authorities on the same side. In *Rex. v. Wyatt* (1), the accused was indicted for obtaining credit on false pretences. He hired furnished apartments from the prosecutrix and went away after three days' occupation of the premises without payment. At the trial evidence was admitted to prove that he had on several previous occasions hired apartments from various other persons and left without payment, the money being still due when he hired the rooms of the prosecutrix. Lord Alverstone, C. J., and four Justices held "this evidence was clearly admissible as tending to establish a systematic course of conduct on the part of the accused, and as negating any accident or mistake or the existence of any reasonable or honest motive," and confirmed the conviction. To the same effect is *Rex. v. Bond* (2), where Bray, J., pointed out that evidence of the kind under discussion is admissible "(i) where the prosecution seeks to prove a system or course of conduct, (ii) where the prosecution seeks to rebut a suggestion on the part of the prisoner of accident or mistake, (iii) where the prosecution seeks to prove knowledge by the prisoner of some fact."

These cases are precisely in point, and in any view we think section 14 of the Evidence Act does make the outside evidence in this case admissible. The case of *Queen-Empress v.*

Vajiram (1) seems to support this view, although that case is sought to be distinguished on the ground that the various fraudulent acts were all committed with the object of evading one and the same decree, and were all done on the same day, and, therefore, as in the case of *Regina v. Rhodes* (2), formed parts of one transaction.

Section 15 of the Evidence Act is an application of the general rule laid down in section 14, and the words of the section as well as of *Illustration (a)* shew that it is not necessary that all the acts should form parts of one transaction, but that such acts should form parts of a series of *similar* occurrences.

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Appeal allowed.

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(3) [1894] A. C. 57.

PRIVY COUNCIL.

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March 11.

RAMAKANTA DAS MOHAPATRA

v.

SHAMANAND DAS MOHAPATRA.

[On appeal from the High Court at Fort William in Bengal.]

Hindu law—Custom—Primogeniture, rule of—Orissa and Cuttack, Land Tenure in—"Paharaj"—"Chowdhuri"—Hereditary Office, Land attached to—Regulation XI of 1793—Regulation XII of 1805, s. 35—Regulation X of 1800—Statements of deceased persons—Evidence Act (I of 1872), ss. 21 and 32, clause (5)—Proof of Custom.

The appellants and respondents were members of a Brahmin family long established and possessed of an estate in Cuttack. To a suit by the appellants for partition of the estate on the ground that it was joint family property governed by the ordinary Hindu law of the Mitakshara School, the defence was that a custom of lineal primogeniture prevailed in the family by which from a period prior to British rule the estate had always descended to the oldest son, the junior members of the family being entitled only to maintenance, and not to any share of the land. The only reliable evidence of the status of the family during the period of native rule consisted of documents of ancient date which showed that the office of Chowdhuri had been held in succession for many generations by a member of the family, and that to the holder of that office certain lands called "nankar" were assigned as part of his remuneration. The Subordinate Judge decreed the suit holding on the evidence that the custom was not proved, but the High Court reversed that decision being of opinion that the evidence was sufficient to establish the custom:—

Held by the Judicial Committee reversing the decision of the High Court, that the evidence fell far of short establishing the custom during the period of native rule. From the documents produced, it appeared that the grant of the office of Chowdhuri was one of an office only; that the office was revocable at the pleasure of the sovereign, and though generally heritable it might be conferred by him not merely on the eldest son but upon any member of the family, or indeed upon anybody. These considerations, though they might suggest a presumption, were not sufficient to establish a right, for which purpose the evidence must be clear and unambiguous.

With regard to the history of the family and their estate after the advent of the British Government, the evidence showed that whenever the holder of the estate died leaving more than one son, the right of the eldest son was challenged in the Courts and the litigation invariably ended in a compro-

* Present: Lord MACNAUGHTEN, Lord ATKINSON, Sir ANDREW SCOBLE, and Sir ARTHUR WILSON.

mise under which the younger sons obtained a share of the estate very much in excess of the maintenance to which, had the custom existed, they would have been entitled. The evidence, therefore, entirely failed to give to the alleged custom the character of certainty which was essential to its validity.

APPEAL from a judgment and decree (21st March 1901) of the High Court at Calcutta which reversed a judgment and decree (27th September 1899) of the Subordinate Judge of Cuttack.

The plaintiffs were appellants to His Majesty in Council.

The main question for determination in this appeal was whether the succession to the property in suit was governed by the rules of lineal primogeniture, or by the ordinary Hindu law.

The history and facts of the case besides being fully set out in the judgment of their Lordships of the Judicial Committee, are sufficiently stated in the report of the case before the High Court which will be found in I. L. R. 32 Calc. 6.

The High Court (PRATT and GEINT JJ.) upheld the custom of primogeniture which was set up by the present respondent, the defendant in the suit.

ON this appeal,

De Gruyther K.C. and *E. U. Eddis*, for the appellants, contended that the evidence on the record was not sufficient to establish a custom of lineal primogeniture. All it showed was that during the period of native rule in Cuttack, namely, up to 1803, the eldest son took the title of Paharaj, and that the office of Chowdhuri had been held by members of the family in succession; but that office was nothing more than a Revenue office, "a remnant of the old Hindu fiscal organisation," of an hereditary character to which any grant of land that was made was attached to the holder of the office as part of his remuneration, no right or custom of succession being shown to such land. Nor was there any proof that the land was impartible or in the nature of a Raj. Statements, it was contended, by various members of the family to the effect that the estate was impartible which had been relied upon by the High Court as being evidence, had been made after the controversy as to the existence of the custom arose, and were

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therefore inadmissible. The oldest son took a title which the younger sons did not take, but did not succeed as such to any land. The meaning of Paharaj was a unit over which the Chowdhuri exercised jurisdiction. Reference was made to Toynbee's History of Orissa, Ed. 1873 (printed at Bengal Secretariat Press), page 24; Account, Geographical, Statistical and Historical, of Orissa and Cuttack, by A. Stirling (reprint in Calcutta in 1904 of Ed. of 1822), page 2, paragraphs 6 and 7, and pages 65, 73 and 79; and Sir W. Hunter's Statistical Account of Bengal, Vol. 18, pages 129, 301. During the period of native rule, it was submitted on these authorities and on the evidence that no such custom, as was contended for by the respondent, had been shown to exist.

Since the commencement of British rule in Cuttack Regulations XI of 1793 and XII of 1805 precluded such a custom except in cases in which succession had devolved according to established usage to a single heir before and up to 1805, which came under Regulation X of 1800; and by section 36 of Regulation XII of 1805 the succession to estates was to be governed by the local law of the country which in this case was the ordinary Hindu law. It was pointed out that in all the cases in which the succession to the property in suit had been in dispute, the litigation had been settled by the younger sons obtaining, not the maintenance they would have been entitled to if the rule of primogeniture had existed and been adhered to, but shares of the estate much in excess of such maintenance, and these, it was submitted, were really shares of a joint estate under the Hindu law.

As to the proof required of such a custom *Ramalakshmi Ammal v. Sivanantha Perumal Sethurayar* (1) was referred to which laid down that a special usage modifying the ordinary Hindu law must be ancient and invariable, and established by clear and unambiguous evidence. Judged by these principles no such custom as was contended for had been proved, and the decree of the Subordinate Judge, which had been reversed by the High Court, should be restored.

(1) (1872) 14 Moo. I. A. 570, 585; (1866) 3 Mad. H. C. 75, 77.

Sir R. Finlay K.C. and Kenworthy Brown, for the respondents, contended that the custom of primogeniture was sufficiently established by the evidence. The land in dispute had for a long term of years been shown to have been attached to the office of Chowdhuri, and that office had been only held by one member of a family, namely, the eldest son. Reference was made to the answers given to certain questions addressed in 1814 to the Rajahs and Chiefs of the Regulation Provinces and Tributary Mahals as establishing the practice as to the succession to their estates (a book printed at the Military Orphan Asylum Press in Calcutta in 1861). The judgment of the High Court was supported for the reasons therein given, which, shortly stated, showed that in the only instance under native rule of which there was evidence regarding the succession, the descent was from father to eldest son, and that since the British occupation the claim of the eldest son to succeed had been invariably upheld in spite of the opposition of the younger sons; and that the law prescribed in the Regulations expressly allowed the rule of primogeniture to prevail in Cuttack in cases in which by established usage succession to an estate could be shown to have devolved to a single heir before 1805 (which it was submitted was the case here) and had not since been departed from. The right to partition had never been recognised.

As to the admissibility of the statements which the appellants argued were inadmissible: *Butler v. Mountgarrett* (1), *Monckton v. Attorney General* (2), and *In re the Berkeley Peccage* (3).

The contention that the family were not really proprietors of the land attached to the office of Chowdhuri, but that it was only remuneration to the holder of the office for the performance of the duties of Chowdhuri was a new one which had not been raised at any previous stage of the suit, and to which evidence had not been directed, and it should not be allowed to be taken for the first time on this appeal. The

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(1) (1859) 7 H. L. C. 632.

(2) (1831) 2 Russ. & M. 147, 161.

(3) (1811) 4 Camp. 401.

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passages cited from Stirling's Account of Orissa and Cuttack were not, it was submitted, applicable under the circumstances in evidence in the present case. Reference was made to the Cuttack Proclamation of 15th September 1804 (set out *in extenso* in Regulation XII of 1805), and the settlement registration made under it, and to *Freeman v. Fairlie* (1) and *Collector of Trichinopoly v. Lekkamani* (2).

As to proof of custom, *Mohesh Chunder Dhal v. Satrugan Dhal* (3) and *Nitr Pal Singh v. Jai Pal Singh* (4) were referred to.

De Gruyther K.C., in reply, referred to *Rajkishen Singh v. Ramjoy Surma Mazoomdar* (5) as to the probability of the succession to the estate in suit being regulated by the ordinary Hindu law; and to *Miller v. Madho Das* (6), and the Evidence Act (I of 1872), sections 21 and 32 clause (5) as to the admissibility of evidence. [*Sir R. Finlay K.C.*, on the latter point, referred to *Shahzadi Begam v. Secretary of State for India in Council* (7).]

The judgment of their Lordships was delivered by

March 11.

SIR ANDREW SCOBLE. The question for determination in this appeal is whether the succession to the estate to which it relates is governed by a family custom of succession by lineal primogeniture, or by the ordinary Hindu Law. The estate is considerable, the major portion of it being comprised in twomahals, named Killa Telmunda and Taluk Aranga, situated in the district of Balasore, in the Province of Orissa. The parties to the suit are members of the same family, the appellants representing a junior, and the respondent the senior, branch of it. The appellants were plaintiffs in the suit, in which they alleged that the family was an undivided family.

(1) (1828) 1 Moo. L. A. 305, 342, 343.

(2) (1874) L. R. 1 L. A., 292, 313.

(3) (1902) L. L. R. 29 Calc. 343;

L. R. 29 L. A. 62.

(4) (1896) L. L. R. 19 All. 1, 14, 15;

L. R. 23 L. A. 147, 156.

(5) (1872) L. L. R. 1 Calc. 186, 188.

(6) (1896) L. L. R. 19 All. 76, 92;

L. R. 23 L. A. 106, 116.

(7) (1907) L. L. R. 34 Calc. 1059, 1073;

L. R. 34 L. A. 191, 192.

governed by the Mitakshara School of Hindu law, and claimed partition of the family property under that law. The respondent, in his written statement, asserted that "according to the custom obtaining in our family from a very remote period, the eldest son of the eldest branch of the family becomes the *malik* of all properties, and his younger brothers are entitled to maintenance only without having any share in them." Upon the issue thus raised, the Subordinate Judge of Cuttack found in favour of the plaintiffs, but his decision was reversed on appeal by the High Court at Calcutta.

The family is a Brahmin family long established in Cuttack, members of which are proved to have held the office of Chowdhuri, under both the Mogul and the Mahratta rule. A great deal of information as to this office is to be found in an official Minute by Mr. Stirling (Secretary to the Commissioner) on Tenures in Orissa, dated 10th October 1821, to which their Lordships have been referred by counsel on both sides, and which appears to be a very carefully-drawn and reliable document. According to this Minute, under the government of the Gajpati native sovereigns, the country was divided for fiscal purposes into districts called Bissce and Khund, over each of which were placed two officers, one called Bisscoe, or Khund-adipati (terms signifying chief of a division) and the other an accountant, called the Bhoce Mool. On the introduction of Todur Mull's revenue settlement, under the Mogul government, somewhere about A.D. 1580, Mr. Stirling says :—

"The titles of Khund-adipati and Bisscoe became lost entirely in the more familiar designation of Chowdhuri (Chief) a word introduced from Bengal and Upper India, though, probably, not unknown before in the province, and the Bhoce Mool received the appellation of the canoonroe willaity (country or provincial canoongoe) The portion of the pergunnah under the more immediate charge of each was called talooka and the managers generally talookdars."

There does not appear to have been any change in the position of these officers under the Mahratta government, and Mr. Stirling came to the conclusion that there exists

"Ample ground for asserting the Mogul and the Mahratta talookdars, who formerly managed and collected the revenues of so considerable a

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proportion of the district with the designation of chowdhuris and canoongoes, were the hereditary revenue and police officers of the old Hindu government under another name."

The remuneration of these officers appears to have been an assignment of rent-free land called "nankar," and the right to certain perquisites or "russooms." As regards the ownership of land, Mr. Stirling observes:—

"The chowdhuri has been generally off-hand assumed to have been a proprietor of land, though the word is obviously only a title given to the head officers (or talookdars) of a pergunnah, and which in modern times has been adopted by the headman of nearly every hereditary art, profession, and bazar Nobody, I believe, ever supposed for a moment that the person called canoongoo by the Moguls was other than a mere servant of Government, though succeeding by regular inheritance to his office. . . . There is obviously no more reason to assume that the chowdhuri or chief of pergunnahs were the proprietors of the land comprised in them than that the canoongoo talookdars were—a conclusion from which most minds would probably revolt, however predisposed to see an absolute European landlord in every superior revenue manager connected hereditarily with the soil."

But as regards the offices held by both chowdhuris and canoongoes, Mr. Stirling goes on to say:—

"Their tenures were certainly generally heritable, though cases of removal were of frequent occurrence, and all the larger holders found it convenient to obtain a sunnud of appointment, or, say of confirmation, on succeeding to their inheritance. The very unscrupulous manner in which the right of ouster was exercised by the native rulers, as is obvious from the frequent occurrence of the word *tughueyyoor* (or change) in the sunnuds, might lead to a conclusion unfavourable to their acknowledged title to transmit hereditarily and furnishes, at all events, a strong ground of presumption that they were regarded as officers of trust, liable to be called to account for their conduct."

But, he concludes,

"It is my decided opinion that, from the hereditary character pervading so remarkably all the institutions of the Hindus, they at all times possessed an imperfect title of property in their offices, which was distinctly admitted and recognized by the practice of the Mogul government."

In the light of these general considerations, their Lordships have carefully examined the evidence produced by the respondent in support of his claim. It consists mainly of two ancient documents, as their Lordships are unable to attach much importance to admissions made in recent years by members of the family. The first of these documents is called an "Appeal of Gopinath Paharaj Chowdhuri to the Public for Testimony." The date is wanting, but it must have been written at some-

time between A.D. 1729 and 1745. It is addressed to all officials, ryots and cultivators of Sarkar Biro—which is presumably the talooka of the applicant—and recites that :—

"A Sanad of former ages of the time of the Emperor Jahangir bearing the seal of Rashid Beg Khan granting for salary 155 hatis of land as nankar, subject to service as Chowdhuri of the aforesaid Sarkar, has become very old and owing to the paper being worm-eaten and worn out it was not capable of being preserved for future time. therefore, in 1137 Amli (A.D. 1729) it was shown to every gentleman, to men of respectability and all residents and amils and functionaries of the said Sarkar."

It was therefore requested that "those acquainted with the facts" will

"prove the document as well as the fact that the forefathers of this applicant from past ages discharged the duties of Chowdhuri of the said Sarkar in consideration of the nankar zamindari and that this applicant also keeps in attendance in the office of Thanadars and Amils and gets the revenue paid."

It does not appear whether anybody complied with the request that he should "record his evidence on this paper"; but on the back is an endorsement : "155 hatis of land under former Sanads assigned as nankar has been confirmed and granted to Chowdhuri Paharaj," and particulars of the land are given.

The second document is a Sanad dated in A.D. 1745 and granted to the eldest son of the Gopinath just mentioned. It is addressed to the Mutsuddis and other functionaries of the mahals described in the Schedule and recites that :—

"The office of Chowdhuri under Sanads of former officials was for ages vested in (the ancestors of) Raghunath Paharaj. Now he has appeared before his Honour, and has made a representation, and his loyalty, truthfulness and his services have become disclosed. Therefore he is appointed as before to the office of Chowdhuri of the said mahals. It is required that you all will conduct all business of the said pargunnahs as before in consultation with him and by his advice . . . and you will leave to him all that is customary for the Chowdhuri and in respect of the nankar as was the practice before. The said Chowdhuri is required that he will not in the slightest degree omit to fulfil his duties loyally, and for the benefit of the Sarkar and for the welfare of ryots. He will appropriate the profits of the dastur and nankar lands as before and he will pay the proper rent of the jaghirdars under him year by year according to ancient usage, and he will make such endeavours as will make manifest his great loyalty and services daily, even more than before, then he will get his reward."

On the back of the Sanad is an endorsement "Chowdhuri's office confirmed in favour of Raghunath Paharaj Chowdhuri,"

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together with particulars of fifteen mahals, which do not correspond with those mentioned in Gopinath's documents, or those in dispute in this suit.

These documents have been recited at length because, as already observed, they form the only reliable evidence of the status of the family under successive native governments. In the opinion of their Lordships, they fall far short of establishing the claim of the respondent. They show, indeed, that the office of Chowdhuri was held, for many generations, by a member of the family, and that to the holder of that office certain lands were assigned as a part of his remuneration. But the grant was of an office only, and to an individual, to be held during good behaviour. It was clearly revocable at the pleasure of the sovereign, by whom it might be conferred, not merely on the eldest son, but upon any member of the family, or, indeed, on any body. In the nature of things, the office could only be held by one person at a time, and, as Mr. Stirling points out, such offices were "generally heritable"; but these considerations, though they may suggest a presumption, are not sufficient to establish a right. For this purpose, the evidence must be clear and unambiguous, which, in this case, it is not. Besides, it is hard to see how a family custom of succession to an estate not absolutely owned by the family could ever have existed.

So far, therefore, as relates to the period of native rule in Cuttack, the case of the respondents fails. It remains to enquire whether, after the British conquest, there was any recognition of the existence of such a custom, either by the family or by the Government.

The conquest of Cuttack took place in 1803, and by a Proclamation dated the 15th September 1804, the British Government declared its intention to adopt "such a plan for the settlement of the land revenue of the Province. . . . as may be most conducive to the prosperity of the country and to the happiness of the inhabitants." With this view, it was ordered that a settlement of the land revenue should be "concluded in all practicable cases with the zamindars, or

other actual proprietors of the soil (unless when disqualified by notoriously bad character or other good and sufficient cause) for the period of one year," on the expiration of which further settlements would be made "with the same persons (if willing to engage, and they shall have conducted themselves to the satisfaction of Government)" for further periods of three, four, and three years respectively at gradually enhanced rates. At the end of these eleven years, in 1822, a permanent settlement would be "concluded with the same persons (if willing to engage, and they have conducted themselves to the satisfaction of Government, and if no others who have a better claim shall come forward) for such lands as may be in a sufficiently improved state of cultivation to warrant the measure on such terms as Government shall deem fair and equitable."

In the following year, Regulation XII of 1805 was passed, confirming and explaining this Proclamation, from sections 2 and 4 of which it appears that the first settlement was made with the persons in possession of the lands, and that the settlement extended to "the Mogulhundy territory of the Zillah of Cuttack," in which the lands now in suit are situated; and by s. 36 it was provided that "nothing herein contained shall be construed to authorize the division of the lands comprised in any estates in the Zillah of Cuttack, in which the succession to the entire estates devolves, according to established usage, to a single heir," in which cases Regulation X of 1800 was to apply, and the Courts were directed to give effect to "the local custom of the country." Generally, however, these newly-formed estates were declared to be descendible like other descriptions of property to all the heirs of the deceased proprietor, according to the Hindu or Mahomedan law of inheritance, as the case might be, and to be liable to partition when devolving on two or more heirs. Regulation XI of 1816, which exempts certain tributary estates in Cuttack from partition, does not appear to apply to the estate in question in this suit.

It will have been noticed that, in the Proclamation, the settlement is to be made "with the zemindars or other actual

1805
RAMAKANTA
DAS
MOHAPATRA
v.
SHAMANAND
DAS
MOHAPATRA



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Act V of 1883 (Indian Merchant Shipping), as modified up to 1st December, 1901 ...	0	0	0	[1a.]
Act VIII of 1883 (Little Cocos and Preparis Island Laws), as modified up to 1st October, 1902 ...	0	1	3	[1a.]
Act XIX of 1883 (Land Improvement Loans), as modified up to 1st September, 1906 ...	0	2	6	[1a.]
Act VI of 1884 (Inland Steam-vessels), as modified up to 1st July, 1891 ...	0	0	0	[2a.]
Act VII of 1884 (Steam-ships), as modified up to 1st July, 1890 ...	0	0	0	[1a.]
Act XII of 1884 (Agriculturists' Loans), as modified up to 1st February, 1903 ...	0	2	0	[1a.]
Act XVIII of 1884 (Punjab Courts), as modified up to 1st December, 1899 ...	0	7	0	[1a.]
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Act XIII of 1886 (Securities), as amended by Act XII of 1891 ...	0	2	0	[1a.]
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Act IX of 1887 (Provincial Small Cause Courts), as modified up to 1st December, 1900 ...	0	6	0	[1a.]
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Regulation I of 1895 (Kachin Hill Tribes), as modified up to 1st April, 1902	0 6 0 [1a.]

III.—ACTS AND REGULATIONS OF THE GOVERNOR-GENERAL OF INDIA IN COUNCIL AS ORIGINALLY PASSED.

Acts (unrepealed) of the Governor-General of India in Council from 1854 to 1906.
 Regulations made under the Statute, 33 VicL, Cap. 3, from No. II of 1875 to 1906. 8vo.
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... .. In Nagri	0 1 3 [1a.]

			Ra.	A.	P.	
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up to 30th April, 1903	{ In Nagri	...	0	0	6	[1a.]
Act XXX of 1852 (Naturalization), as modified up	{ In Urdu	...	0	0	6	[1a.]
to 1st December, 1902	{ In Nagri	...	0	0	6	[1a.]
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Act XX of 1858 (Police Chankidars), as modified up	{ In Urdu	...	0	2	6	[1a.]
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Act XXXIV of 1858 (Lunacy (Supreme Courts)),	{ In Urdu	...	0	1	0	[1a.]
as modified up to 30th April, 1903	{ In Nagri	...	0	1	0	[1a.]
Act XXXV of 1858 (Lunacy (District Courts)), as	{ In Urdu	...	0	1	0	[1a.]
modified up to 30th April, 1903	{ In Nagri	...	0	1	0	[1a.]
Act XXXVI of 1858 (Lunatic Asylums), as		...	0	1	8	[1a.]
		...	0	0	3	[1a.]
		...	0	0	3	[1a.]
Act IX of 1860 (Employers and Workmen (Dis-	{ In Urdu	...	0	0	3	[1a.]
putes)), as modified up to 1st December, 1904	{ In Nagri	...	0	0	3	[1a.]
Act XLV of 1860 (Penal Code), as modified up to	{ In Urdu	...	1	3	0	[5a.]
1st April, 1903	{ In Nagri	...	1	3	0	[5a.]
Act V of 1861 (Police), as modified up to 7th	{ In Urdu	...	0	2	0	[1a.]
March, 1903	{ In Nagri	...	0	2	0	[1a.]
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1st September, 1906	{ In Nagri	...	0	1	0	[1a.]
Act III of 1865 (Carriers), as modified up to 31st	{ In Urdu	...	0	0	9	[1a.]
May, 1903	{ In Nagri	...	0	0	0	[1a.]
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Act IX of 1874 (European Vagrancy)	...	In Urdu	...	0 2 0	[1a.]
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Act XVIII of 1879 (Legal Practitioners), as modified up to 1st May, 1806	...	In Urdu	...	0 2 6	[1a.]
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		{ In Nagri	...	0	0	3	[la.]
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		{ In Nagri	...	0	0	3	[la.]
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		{ In Nagri	...	0	0	3	[la.]
Act VIII of 1897 (Reformatory Schools) ...	---	{ In Urdu	...	0	1	3	[la.]
		{ In Nagri	...	0	0	0	[la.]
Act IX of 1897 (Provident Fund), as modified up to 1st April, 1903 ...	---	{ In Urdu	...	0	0	0	[la.]
		{ In Nagri	...	0	0	0	[la.]
Act X of 1897 (General Clauses) ...	---	{ In Urdu	...	0	1	0	[la.]
		{ In Nagri	...	0	1	0	[la.]
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		{ In Nagri	...	0	0	3	[la.]
Act XV of 1897 (Canionments) ...	---	In Urdu	...	0	0	3	[la.]
Act I of 1898 [Stage Carriages Act (1861) Amendment] ...	---	{ In Urdu	...	0	0	3	[la.]
		{ In Nagri	...	0	0	3	[la.]
Act III of 1898 (Lepers) ...	---	{ In Urdu	...	0	0	6	[la.]
		{ In Nagri	...	0	0	0	[la.]
Act IV of 1898 (Indian Penal Code Amendment) ...	---	In Urdu	...	0	0	3	[la.]
Act V of 1898 (Code of Criminal Procedure), as modified up to 1st April, 1900 ...	---	{ In Urdu	...	1	4	0	[8a.]
		{ In Nagri	...	1	6	0	[8a.]
Act VI of 1898 (Post Office) ...	---	{ In Urdu	...	0	3	3	[la.]
		{ In Nagri	...	0	3	3	[la.]
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		{ In Nagri	...	0	2	3	[la.]
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		{ In Nagri	...	0	0	3	[la.]
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		{ In Nagri	...	0	1	6	[la.]

			Rs. A. P.		
Act IX of 1899 (Arbitration)	...	{ In Urdu In Nagri	...	0 0 0	[1a.]
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Act XII of 1899 (Currency Notes Forgery)	...	{ In Urdu In Nagri	...	0 0 3	[1a.]
Act XIV of 1899 (Tariff Amendment)	...	{ In Urdu In Nagri	...	0 0 3	[1a.]
Act XVII of 1899 (Indian Registration Amendment)	...	{ In Urdu In Nagri	...	0 0 3	[1a.]
Act XVIII of 1899 (Land Improvement Loans Amendment)	...	{ In Urdu In Nagri	...	0 0 3	[1a.]
Act XX of 1899 (Presidency Banks)	...	{ In Urdu In Nagri	...	0 0 3	[1a.]
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THE INDIAN LIMITATION ACT OF 1908

WITH

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BY

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Calcutta Law Journal, 1909 says :—The

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s. 556 of the Criminal Procedure Code, to hear the appeal on conviction of the accused. The irregularity of transferring a case, when the Magistrate is not empowered under s. 192 to do so is cured by s. 529 (f)

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mis-statements of fact, however *bona fide*. *Davis & Sons v. Shephstone*, 11 App. Cas. 187; *Popham v. Pickburn*, 7 H. & N. 891; *Peter Walker & Son Ltd. v. Hodgson*, [1909] 1 K. B. 239; *Digby v. The Financial News, Ltd.*, [1907] 1 K. B. 502; *Hunt v. The Star Newspaper*

Company, Ltd., [1908] 2 K. B. 309, and *Thomas v. Bradbury, Agnew & Co., Ltd.*, [1906] 2 K. B. 627, referred to. Imputing to a person the commission of a criminal offence does not fall within the range of fair comment. *Barrow v. Hem Chunder Lahiri*, I. L. R. 35 Calc. 495, followed.

was deported under the provisions of Regulation III of 1818 should not be taken into consideration as a ground for mitigation of damages.

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Code cannot be supported whenever the common object, as stated in the charge, is not precisely made out. The question in each case is

Where the accused, who were found to be in possession of the disputed land, went upon it in a large body armed with *lathis*, prepared in anticipation of a fight, and where reposing the paddy grown by them, when the complainant's party came up and attempted to cut the same, whereupon a fight ensued and one man was seriously wounded and

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died subsequently :—*Held*, that on the facts established, the common object was not to enforce a right or supposed right but to maintain undisturbed the actual enjoyment of a right, and that the assembly was not, therefore, unlawful under s. 141 (4). Where one accused, under the circumstances, caused simple hurt, and another, a fracture of the skull which ended fatally :—*Held*, that the former was within his right of private defence, but that the latter had not proved facts bringing the case under section 103 (4).

SILAJIT MAUTO v. EMPEROR, I. L. R. 36 Calc. 865

RIOTING—*Right of Private Defence*—*Protection of Zemindar's right to Property*—*Excessive hurt by one member of an unlawful assembly*—*Criminal liability of the other members thereof*—*Penal Code (Act XLV of 1860) ss. 147, 148*. Where the tenants were found to have held their lands on the *latas* system, under which harvested crops should be taken to the village *Wahdan*, but it appeared that they went in a large body armed with *lathis* with the avowed intention of removing them to their own houses, and were making up the crops already cut into bundles, whereupon the zemindars' watchmen remonstrated and a number of their *amlas* went to the spot armed with *lathis* and swords and a fight took place, owing to the interference of the leader of the tenants, in the course of which some of the tenants received slight injured wounds and one of them a severe one inflicted by one of the accused, and where it further appeared that the zemindars' people had, four days before the date of the occurrence, sent an urgent appeal to the police for protection against a serious breach of the peace which seemed imminent :—*Held*, that, inasmuch as the common object of the accused was to protect the zemindars' rights over the crops, and there was no specific finding by the Sessions Judge that their intention was to use more force than was necessary or that they had in fact used excessive force, they acted in the exercise of the right of private defence and were not guilty of rioting. *Held*, also, that, as there was nothing to show that the grievous hurt caused by one of the accused was not his own individual act, the others were not guilty under s. 148 of the Penal Code. Each case of this kind must be decided on its own particular facts. *Rajinath Dhanuk v. Emperor*, I. L. R. 36 Calc. 286, distinguished.

RAM KHULAWAN SINGH v. EMPEROR, I. L. R. 36 Calc. 827

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RAJANI KANTA DUTT v. EMPEROR, I. L. R. 36 Calc. 901

TRANSFER OF PROPERTY ACT (IV OF 1882) ss. 83, 84—*Deposit made in full discharge of mortgage loan*—*Will drawn up by Receiver as agents of mortgagees*—*Will drawn up without following the provisions prescribed by the Act*—*Principal and Agent*—*Sonthal Pergunnah Settlement*

Regulation III of 1872, s. 6, as amended by s. 24 of Regulation V of 1893, construction of, as to amount of interest recoverable on bond—Interest previously paid by debtor whether to be taken into account in making decree. On 27th July 1885 a simple mortgage bond for Rs 34,000 providing for interest at 18 per cent. per annum and on default in payment compound interest at the same rate, was executed by a debtor, now represented by the respondents in favour of one of a firm of money-
 6 of the
 amended
 to the amount of Rs. 23,403-15-6 had at various times been paid and
 erest up to that date Nothing more
 1895, the mortgagee being anxious to
 to the mortgagee, in full discharge
 of the bond, the sum of Rs. 44,596-0-6, a sum fixed, as amounting
 together with the interest already paid, to Rs. 68,000, which
 by s. 6 of Regulation III of 1872, as amended by s. 24 of
 Regulation V of 1893, was the full amount (being double the principal) which the mortgagor considered could be recovered from him on the bond. On tendering that amount the mortgagor demanded the return of the bond, but the mortgagee, though willing to give a receipt for the money, could not give him the bond, and the mortgagor deposited the money in Court under the provisions of s. 83 of the Transfer of Property Act, that is, in full discharge of the bond. Notice of the deposit was sent to the mortgagee, but the money was not withdrawn until 23rd September 1896, when a Receiver appointed in a partnership suit between the members of the mortgagee's firm succeeded in withdrawing it by some means not disclosed, and without the provisions of the Transfer of Property Act for such withdrawals being followed. On 7th February 1900 the mortgagee and his partners brought a suit on the bond for Rs. 33,698-0, in which they credited the amount of Rs. 44,596-0-6 as having been paid in part satisfaction of the bond on the day when it was drawn out, and charged interest and compound interest at 12 per cent. on the entire sum (Rs. 22,859-5) shown to be due on that date. The pleas in defence were section 6 of Regulation III of 1872 as limiting the amount of interest recoverable, and the deposit under s. 83 of the Transfer of Property

that in the absence of anything to show that he had any greater power or authority to withdraw the money than the plaintiffs themselves had, the Receiver must be taken to have withdrawn it, subject to the conditions prescribed by section 83 of the Transfer of Property Act, that is, in full discharge of the bond. The plaintiffs were bound by the acts of their agent and could not rely upon the Receiver's default in omitting to perform any of the necessary conditions, in order to escape from the consequences which would of necessity have followed the withdrawal if every thing prescribed by the Act had been rightly done.

RAM CHANDRA MARWARI v. KESHOBI KUMARI, L. L. R. 36
 Calc.

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WITNESSES: See APPELLATE COURT.

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CRIMINAL REVISION.

Before Mr. Justice Caspersz and Mr. Justice Ryves.

RAM KHELAWAN SINGH

v.

EMPEROR.*

1909

March 10.

Rioting—Right of Private Defence—Protection of Zemindar's right to Property—Excessive hurt by one member of an unlawful assembly—Criminal liability of the other members thereof—Penal Code (Act XLV of 1860) ss 147, 311.

Where the tenants were found to have held their lands on the *batai* system, under which harvested crops should be taken to the village *khalihan*, but it appeared that they went in a large body armed with *lathis* with the avowed intention of removing them to their own houses, and were making up the crops already cut into bundles, whereupon the zemindars' watchmen remonstrated and a number of their *amlas* went to the spot armed with *lathis* and swords and a fight took place, owing to the interference of the leader of the tenants, in the course of which some of the tenants received slight incised wounds and one of them a severe one inflicted by one of the accused, and where it further appeared that the zemindars' people had, four days before the date of the occurrence, sent an urgent appeal to the police for protection against a serious breach of the peace which seemed imminent—

Held, that, inasmuch as the common object of the accused was to protect the zemindars' rights over the crops, and there was no specific finding by the Sessions Judge that their intention was to use more force than was necessary or that they had in fact used excessive force, they acted in the exercise of the right of private defence and were not guilty of rioting.

Held, also, that, as there was nothing to show that the grievous hurt caused by one of the accused was not his own individual act, the others were not guilty under ss 311 of the Penal Code.

Each case of this kind must be decided on its own particular facts.

Bajinath Dhanuk v Emperor (1) distinguished.

The appellants and 12 others were convicted, on the 23rd December 1908, by the Sub-divisional Officer of Barh, variously, under sections 147, 148, 324 and 311 of the Penal Code, and sentenced to different terms of imprisonment, some

* Criminal Revision No. 75 of 1909, against the order of C. W. E. PILLAI, Sessions Judge of Patna, dated Jan. 13, 1909.

(1) (1906) I L R 36 Cal. 276.

1909
 RAM
 KHELAWAN
 SINGH
 v.
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being also sentenced to fines, and were further bound down under section 106 of the Criminal Procedure Code for one year. On appeal the Sessions Judge of Patna by his order, dated the 13th January 1909, acquitted 12 of the accused, and convicted four under section 147 and four under section 148 of the Penal Code, setting aside the fines and the order under section 106.

It appeared that there was a dispute between the landlords and the tenants as to the nature of their tenancy, the former asserting that it was *bhaoli* and the latter that it was *nugdee*. Both Courts found that the tenants held their lands *bhaoli* on the *butai* system under which the crops when cut should have been taken to the village *khalihan* and the shares of each party there distributed. The time for harvesting had arrived, and the tenants openly expressed their intention to remove the crops to their own villages. In consequence of an apprehended disturbance, the appellant, Bhim Lall, as head *punch* of the circle, sent a letter, on the 16th September 1908, to the police informing them of the dispute and the likelihood of a serious breach of the peace from the attempt on the part of the tenants to assert their claim of *nugdee* tenure and to reap the crops, and of the opposition that would be offered by the zemindars' *amlas*, two of whom were named and were among the appellants. Some watchmen were placed on the fields to guard the crops on behalf of the zemindars. On the 20th of September, before the police could send assistance, the tenants, forty or fifty in number and armed with *lathis*, proceeded to the lands and began collecting the crops which had been cut before in bundles. The watchmen remonstrated, and the accused arrived on the scene armed with *lathis* and swords. For a time a breach of the peace was averted, but, owing to the aggressive attitude of one Shyama Mahton, the "champion" of the tenants, took place of the tenants received slight but Shyama Mahton, injured by one Peari who was out in the field as "to prevent the other from doing so, and

also to assault the tenants for having cut the same, notwithstanding the protests of the zemindars' servants."

The Sessions Judge found that it could not have been the object of the accused to prevent the cutting of the crops or to punish the tenants for having done so, but that the intention was to prevent them from carrying off the *makai* in order to protect the zemindars' rights. He held that the landlords had an undoubted right to prevent the removal of the crops and their disposal in such a manner that no division could take place, a course which would have entailed serious loss on them and involved them in unnecessary litigation, but that the question was how far they were justified in sending a body of men to prevent the threatened invasion of their rights, and that, if the accused went with the intent of using criminal force more than was necessary, they would be guilty of being an unlawful assembly. He found that they were not justified in forming an unlawful assembly to enforce their right by means of criminal force, and that they were aware that there was a probability of causing greater harm than was necessary for avoiding any harm to the property in dispute.

Mr. Ali Imam (Mr. Huq and Syed Enayet Karim with him), for the petitioners, argued mainly that upon the findings of the Sessions Judge the right of private defence was established.

No one showed cause.

CASPERSZ AND RYVES JJ. This Rule was issued on the District Magistrate of Patna to show cause why the conviction and sentences passed on the petitioners should not be set aside on the ground that they (the zemindars' people) were acting in the exercise of their right *bonâ fide* in preventing the tenants from harvesting the crops in any place other than the village *khalihan*.

We have heard learned counsel in support of the Rule, and perused the judgments of the lower Courts. Twenty persons were originally charged, variously, under sections 147 and 148, and under sections 324 and 325 of the Indian Penal

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Code, and convicted and sentenced to various terms of imprisonment. Some of them were also ordered to pay fines, and all of them were bound down under section 106 of the Criminal Procedure Code to keep the peace for one year.

On appeal, the learned Sessions Judge acquitted twelve and convicted eight persons. Of these, four were convicted under section 148 of the Indian Penal Code and the remaining four under section 147. The rest were acquitted, the fines were remitted, and the order under section 106 was discharged. These eight persons whose convictions were upheld obtained the Rule set out in the beginning of this judgment.

The common object of the rioters, as charged, was (i) to prevent by force, or show of force, the tenants from cutting the crops, and (ii) to assault them by way of punishment for having cut the crops.

The facts of the case, as found by the learned Sessions Judge, are as follows. For a considerable time past there has been a dispute between the tenants and the zemindars as to the nature of their tenancy, the tenants asserting that their tenancy was *nugdee*, whereas the zemindars asserted that it was *bhaoli*. The time for harvesting the crops had arrived, and the tenants had openly expressed their intention of cutting the crops and carrying them away to their houses. The friction between the parties had become so acute that two watchmen were placed on guard on behalf of the zemindars, and an urgent appeal was made to the police authorities for protection as a serious breach of the peace seemed imminent. This happened on the 16th September 1908. The occurrence, with which we are concerned, took place four days subsequently, that is, on the 20th September. In the meantime, it appears that some of the crops had been cut and left on the field. It has been found by both the Courts that the tenants held their land on the *batai* system. The crops, therefore, when cut, should have been taken to the village *khalihan*. On the morning of the 20th September, it has been found that, a large number of tenants armed with *lathis* went to the field with the avowed intention of carrying away the crops, which

had already been cut, to their own houses, and actually began making bundles of the harvested *makai*. The watchmen who had been placed there protested, and a number of the *amlas* of the zemindars came to the spot, armed, some with *lathis* and, it is said, six of them with swords. Their common intention, it is found, was to protect the zemindars' property. For a time, apparently, they were successful in preventing a breach of the peace, until one Shyama Mahton, who is described in the lower Court's judgment as "the champion of the tenants," interfered. According to the first informations given by one of the tenants himself, the tenants insisted on their right to "take away the crops, and began making them up into bundles when the zemindars' people prevented them." Thereupon a fight took place, and persons on both sides were injured. Some of the tenants had incised wounds, though, with the exception of Shyama Mahton, not of a severe character, which makes it more probable that some of the zemindars' *amlas* had swords and used them. The only severe injury to Shyama Mahton was inflicted by one Peari who has since died.

The learned Sessions Judge has found that the common object in the charge, on which the accused were tried, has not only *not* been proved, but it could not have been their object. The common object which he has found, although the accused were not charged with it, was to prevent the tenants from carrying away the crops. He has found that the tenants were the aggressors in the fight, that they had no right to take the crops to their own houses, and that both the watchmen were wounded in the fight. He goes on to say:—"Up to a limit they (the zemindars) had, no doubt, a right to prevent the harvesting in the manner intended by the tenants. But under the criminal law they were not justified in forming an assembly for enforcing that right by means of criminal force." Earlier in his judgment, after referring to section 81 of the Indian Penal Code, he held:—"Now in the present case, the landlords had an undoubted right to prevent their crops being so disposed of that no division could take place, which would have

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entailed serious loss to them and would have involved them in unnecessary litigation. The question is how far they were justified in sending a body of men to prevent the threatened invasion of their rights. If the assembly went with the intention of using criminal force more than was necessary to prevent that, the members would be guilty of forming an unlawful assembly."

There is no finding in the judgment, however, that the intention of this assembly was to use more force than was necessary, nor is there any finding that they, in fact, did use more force than was necessary, though this may be inferred from the Judge's order convicting the petitioners. There is nothing to indicate that the common object of the assembly was to do anything more than protect their masters' property. We do not think that in protecting their masters' property they were not justified in using such force as was necessary to prevent the tenants from carrying away the crops. The only severe injury that was inflicted by them appears to have been caused, as we have said, by Peari who has died. It may be that Peari used more force than was necessary, but there is nothing to show that it was not an individual act of his, or that the assembly, which in its inception was not unlawful, became an unlawful assembly subsequently.

Each case of this kind must be decided on its own particular facts. The facts in this case are distinguishable from those in the case of *Bajinath Dhanuk v. Emperor* (1).

We think that in this case, on the findings arrived at by the learned Sessions Judge himself, the Rule must be made absolute. We, therefore, acquit the accused and discharge them from their bail.

M. K. M.

Rule absolute.

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[On Appeal from the High Court at Fort William in Bengal.]

Appellate Court—Taking additional Evidence on Appeal—Civil Procedure Code (Act XIV of 1882) s. 568—Witnesses—Application for Probate—Examination of only some of Witnesses in support of Will—Tender of others for Cross-examination—Courts differing on question of fact on different Evidence—Presumption of Correctness of Appellate Court.

On an application to a District Judge for probate of a will, the evidence of three out of the six witnesses in support of it was taken, and then the applicant and two other witnesses were tendered for cross-examination, and the caveators, on the ground that such a course was not in accordance with the practice of the Civil Courts, declined to cross-examine them and their evidence was not given. The District Judge came to the conclusion on the evidence that the will was genuine and granted probate of it. On appeal the High Court, the parties consenting, took the additional evidence of the three witnesses under s. 568 of the Civil Procedure Code, and on a consideration of the whole of the evidence came to an opposite conclusion from that of the District Judge and dismissed the application for probate:—

Held, that on a pure question of fact, the Courts having differed on what were not the same materials for decision, the Judicial Committee would not reverse the decree of the High Court unless they were satisfied it was wrong, and they were not so satisfied.

An objection by the appellants that in taking additional evidence the High Court had not acted in accordance with the provisions of s. 568 of the Code of Civil Procedure, was disallowed as the appellants had, without raising any objection at the time, consented to the additional evidence being taken.

• APPEAL from a judgment and decree (3rd March 1904) of the High Court at Calcutta which reversed a judgment and decree (6th August 1901) of the Court of the District Judge of Gaya.

The petitioner for probate was the appellant to His Majesty in Council.

• *Present* : LORD ATKINSON, LORD COLLINS, LORD SEAW, SIR ANDREW SCOBLE and SIR ARTHUR WILSON.

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The principal question raised on this appeal related to the genuineness of a will, dated 21st December 1900, purporting to have been executed by one Chhote Narayan Pershad.

The testator died on the morning of 22nd December 1900 leaving a widow, the respondent Manna Koer, and a daughter Lakshmi Koer. He was the adopted son of Jekhi Lal; after whose death one of his widows, the respondent Janki Koer, adopted the respondent Hanuman Pershad. Jagannath Pershad was the natural brother of Chhote Narayan Pershad, both being sons of Ram Bekha Lal.

By the will the testator bequeathed his moveable property and cash to his wife for life with remainder to his daughter. To his wife he also bequeathed an annuity of Rs. 200 per mensem and to his daughter a house and a village and the sum of Rs. 10,000 for the expenses of her marriage. His natural brother, the appellant, was appointed executor and residuary legatee.

On 2nd January 1901, the appellant applied to the Court of the District Judge of Gaya for probate of the will. Caveats were lodged by Hanuman Pershad, Janki Koer and Manna Koer, the respondents, and later they filed written statements. Manna Koer stated that her husband died of plague, and was almost unconscious and not in a fit state of mind to execute a will on 21st December 1900. The other respondents also asserted that the testator was unconscious at the time the will was said to have been executed.

The circumstances under which the will was made were that instructions to draft the will were given by the testator on the afternoon of the 20th December, 1900, to Mr. Abdul Halim, who deposed to his being obliged to further instruct a pleader, Moti Lal Das, to prepare the draft. The pleader gave evidence as to the preparation of the draft-will that same night and giving it to Gur Sahai, the testator's clerk. This man after seeing and consulting the testator made a fair copy of it on the 21st December, and that same afternoon it was duly executed in the presence of the following witnesses: Ram Pertab Misra, Mahadeo Pandey, Rung Lal Pundit, Radha

Kishen and Bodh Singh. Of these persons Mahadeo Pandey, Rang Lal Pundit and Bodh Singh were examined as witnesses, and the appellant tendered himself, Ram Pertab Misra, and Radha Kishen for cross-examination: an objection was taken to this procedure as being not warranted by law; the objection was overruled, but the caveators declined to cross-examine the witnesses.

On behalf of the caveators Manna Koer was examined on commission, and other witnesses were examined as well as Manna Koer to show that Chhote Narayan Pershad was ill for several days before his death, that he died of plague, and that he was unconscious on the day on which he was said to have executed a will.

In support of the caveators' case three letters, marked as exhibits F, G, and H, from the father of the deceased to the brother of his widow, which purported to bear the initials of Jagarnath Pershad, the appellant, in English, were put in.

The District Judge, after a careful examination of the evidence, and giving due consideration to the position of the witnesses who deposed to the genuineness of the will, believed their evidence, and concluded his judgment by saying:—

"It appears to me on the whole that the testimony to the genuineness of the will and the competency and *animus testandi* of the testator is overwhelming, and that the evidence by which it is attempted to be rebutted is altogether untrustworthy; I therefore admit the will to probate."

Two appeals were preferred from that decision to the High Court and were partly heard together on 28th January 1904 by GUNUDAS BANERJEE and BRETT JJ., who made the following order:—

"After we had heard the learned vakil for the appellants in these two cases up to certain points, it appeared to us, subject to what the other side might have to say on the point, that it was desirable that the three witnesses Radha Kishen, Ram Pertab Misra, and Jagarnath Pershad, the applicant for probate, who had been, as order No. 26 of the 26th June 1901 shows, tendered for cross-examination, but not examined at all, should be examined as witnesses in accordance with the provisions of section 568, clause (b) of the Code of Civil Procedure, to enable this Court to decide these appeals satisfactorily; and we accordingly asked the learned gentlemen on both sides before proceeding further, to say what they had to say with reference to our taking that course. The learned vakil for the appellants said, he had no objection to

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those witnesses being examined, and he only suggested that they should be examined in this Court. The learned gentlemen on the other side said they did not object to the course suggested."

The evidence of those witnesses was taken on 23rd February 1904 when the High Court also admitted in evidence certain alleged extracts from books of account kept by the testator.

The appeals were heard on 3rd March 1904, and owing to the retirement of BANERJEE J., by a Bench differently constituted (BRETT and SARADA CHARAN MITRA JJ.) who after stating the facts continued:—

"These appeals first came on for hearing on the 28th January 1904 before a Bench of which one of us was a member, and the attention of the Court was drawn to the fact that the applicant and the two witnesses to the alleged will, Babu Radha Kishen and Ram Portap, had not been examined before the District Judge, and as it was in the opinion of the Court desirable that the evidence of these three persons should be taken, the hearing of the appeal was adjourned for their attendance. The mere fact that they were tendered for cross-examination would not entitle the applicant to contend that their evidence supported his case and as they were material witnesses they should have been examined. They have now attended and have been examined before us and the appeals have been argued in full."

After discussing the whole of the evidence at some length, the judgment concluded as follows:—

"The will itself in appearance is not beyond suspicion. The signatures of the testator and the witnesses do not bear the appearance of being written at the same time with the same pen and ink as alleged. The District Judge appears to accept as indicative of the genuineness of the will, the fact that four of the witnesses were the same as attested the admittedly genuine document, Ex. D, executed by Chhote Narayan. We cannot agree with him. All of the witnesses but one to the present document arrived by chance at the time it was being executed and the coincidence which the District Judge notices is so remarkable as rather to raise a strong suspicion against the will. The terms of the alleged will are also inconsistent and difficult to understand. Babu Moti Lal Das says it is the first deed which he had ever drafted for Babu Chhote Narayan. It is remarkable also that it should contain the statement by the testator that there had been no misunderstanding between him and his father and brother on any matter. If true, the statement was unnecessary. On the other evidence in the case, however, its truth appears to us doubtful.

"After a careful consideration of the evidence adduced to support the will, we are unable therefore to regard it as trustworthy or as proving the due execution of the will by Babu Chhote Narayan Pershad. It is not impossible that the deceased may have formed the intention of disposing of his property by a will, but we are not satisfied that his intention are embodied in the document Ex. I, or that the document was executed by him or that he was in fit condition of mind or body to execute a will at the time the document

produced is said to have been executed. We are unable to agree with the learned counsel for the respondent that the cash book including the entries Ex. M. N. O. was not properly proved. It was proved by Jagannath to be the cash book of Balu Chhote Narayan, and the entries were proved by Ram Kishen to be in the handwriting of Ram Beka Lal, the father of the deceased, who, it was proved, kept this book. It is impossible to believe that Ram Beka would have forged entries to discredit the application of Jagannath. The letters, Ex. F. G. H., are also proved by Sital Pershad, and we cannot place any reliance on Balu Jagannath's denial of the initials as his. In our opinion, Jagannath, when denying his acquaintance with the Kaithi character and the English alphabet, is trying to prove too much, and we cannot believe his evidence on those points. It was for the applicant to prove the genuineness of the will, and as he has in our opinion failed to do this, it is impossible to suggest that the will is rejected on suspicion only.

"For the above reasons, we are unable to agree with the findings and judgment of the learned District Judge. On the other hand we hold that the applicant has failed to prove that the document Ex. I is the will of Babu Chhote Narayan Pershad and that it was duly executed by him. We accordingly set aside the judgment and order of the lower Court and in lieu thereof dismiss the application with costs."

On this appeal,

DeGruyther, K.C., and *E. D. Jackson*, for the appellant, contended that the action of the High Court in admitting additional evidence was improper and not warranted by the Code of Civil Procedure. And the case of *Kessorji Isur v. Great Indian Peninsula Railway Company* (1) was referred to as showing that the use of the procedure provided by section 568 of the Civil Procedure Code was only legitimate "when, on examining the evidence as it stands, some inherent lacuna or defect becomes apparent." In the present case the appeal had only been partly heard, and though no objection was taken at the time, there seemed to be no "substantial reason" given as required by section 568 why the additional evidence should have been taken. As to the extracts from the account book they were put in by the pleader for the first time before the High Court on appeal. The book of accounts was not properly proved, and the inferences drawn from such extracts might well be erroneous.

Ross, for the respondent Manna Koer, contended the objection under section 568 of the Code had not been taken

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before ; the parties had in fact agreed to the additional evidence being taken, and the objection could not now be raised for the first time on this appeal. As to the account book, the passage from the High Court judgment set out above was referred to in which they mentioned the book and the three entries extracted from it. It could not be taken for granted that the evidence of the unexamined witnesses would have supported the appellant's case. The High Court had their evidence before them, which the lower Court had not, and it did not satisfy the High Court. The presumption was in favour of the High Court judgment being right unless it was clearly shown to be wrong.

De Gruyther, K.C., replied.

The judgment of their Lordships was delivered by

May 11.

SIR ARTHUR WILSON. This is an appeal from a judgment and decree of the High Court of Bengal dated the 3rd of March, 1904, which reversed those of the District Judge of Gaya of the 6th of August, 1901.

The main question raised on the appeal is as to the genuineness of the will, purporting to have been made by one Chhote Narayan Pershad, and dated the 21st of December, 1900. Chhote Narayan died on the morning of the next day to that on which the will bears date, and left a widow, the respondent Manna Koer, and a daughter Lakshmi Koer. Chhote Narayan was the adopted son of one Jokhi Lal. After Jokhi Lal's death one of his widows adopted the respondent Hanuman Pershad. The appellant is the brother by birth of Chhote Narayan Pershad, their father being one Ram Rekha Lal.

The will purported to make various provisions for the testator's wife and daughter, and appointed the now appellant, the testator's brother by birth, as residuary legatee and executor.

The appellant applied for probate of the will in the Court of the District Judge of Gaya. Caveats and written statements were filed in answer, and the case was heard before the District Judge. Three of those who appear as attesting

witnesses to the will were called at the hearing. The other two attesting witnesses, and the appellant himself, were not examined by the applicant: they were tendered for cross-examination but not cross-examined. Evidence was called on the other side. The District Judge was satisfied that the testimony to the genuineness of the will, and the competency and *animus testandi* of the testator, was overwhelming, and the evidence on the other side altogether untrustworthy; and he granted probate accordingly.

The respondents appealed to the High Court of Bengal. That Court made an order at the hearing of the appeal for the examination, as witnesses, of the appellant himself and the two witnesses to the will who had not been examined in the first Court. Those persons were accordingly examined. The High Court also admitted certain extracts from books of account alleged to have been kept by the testator. In the result the High Court held that the circumstances connected with the alleged execution of the will were involved in suspicion, and that the will was not sufficiently proved; and accordingly a decree was passed which set aside that of the District Judge, and dismissed the application for probate with costs. Against that decree the present appeal has been brought.

On the argument of the appeal it was objected that the examination of the three witnesses by the Court of Appeal was irregular: but it appears that that examination was taken with the assent of both sides. It is not open, therefore, to anybody to complain of it now.

It is objected, secondly, that the admission of the account books on appeal was irregular. But there is nothing to show that that admission was objected to at the time.

Their Lordships thus have to face the position that, on a pure question of fact, the two Courts in India have differed, and the materials before those two Courts have not been entirely the same.

The question their Lordships have to answer is, whether they shall advise His Majesty that the decree of the High

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Court should be reversed. That they cannot do, unless they are satisfied that the decree appealed against was wrong, and they are not so satisfied.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellant will pay the costs of the respondent, Musummat Mauna Koer, who alone defended the appeal.

Appeal dismissed

Solicitors for the appellant : *T. L. Wilson & Co.*

Solicitors for the respondent Mauna Koer : *Barrow, Rogers & Nevill.*
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[On Appeal from the High Court at Fort William in Bengal.]

Transfer of Property Act (IV of 1882) s. 83, 84—Deposit made in full discharge of mortgage bond—Withdrawal of money by Receiver as agents of mortgagees—Withdrawal without following the provisions prescribed by the Act—Principal and Agent—Sonthal Pergunnahs Settlement Regulation III of 1872, s. 6, as amended by s. 24 of Regulation V of 1893, construction of, as to amount of interest recoverable on bond—Interest previously paid by debtor whether to be taken into account in making decree.

On 27th July 1895 a simple mortgage bond for Rs. 34,000 providing for interest at 18 per cent. per annum, and on default in payment compound interest at the same rate, was executed by a debtor, now represented by the respondents in favour of one of a firm of money-lenders, the transaction being admittedly governed by section 6 of the Sonthal Pergunnahs Settlement Regulation III of 1872, as amended by Regulation V of 1893. On 27th October 1899, interest to the amount of Rs. 23,403-15-6 had at various times been paid and that was all that was due for interest up to that date. Nothing more was paid until, on 17th August 1905, the mortgagor being anxious to redeem the mortgage tendered to the mortgagee, in full discharge of the bond, the sum of Rs. 44,598-0-6, a sum fixed, as amounting together with the interest already paid, to Rs. 68,000, which by section 6 of Regulation III of 1872, as

* Present : LORD ATKINSON, LORD COLLINS, LORD SHAW, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

amended by section 24 of Regulation V of 1893, was the full amount (being double the principal) which the mortgagor considered could be recovered from him on the bond. On tendering that amount the mortgagor demanded the return of the bond, but the mortgagee, though willing to give a receipt for the money, could not give him the bond, and the mortgagor deposited the money in Court under the provisions of section 83 of the Transfer of Property Act, that is, in full discharge of the bond. Notice of the deposit was sent to the mortgagee, but the money was not withdrawn until 23rd September 1896, when a Receiver appointed in a partnership suit between the members of the mortgagee's firm succeeded in withdrawing it by some means not disclosed, and without the provisions of the Transfer of Property Act for such withdrawals being followed. On 7th February 1900 the mortgagor and his partners brought a suit on the bond for Rs. 33,698-9, in which they credited the amount of Rs. 44,590-0-5 as having been paid in part satisfaction of the bond on the day when it was drawn out, and charged interest and compound interest at 12 per cent. on the entire sum (Rs. 22,859-5) shown to be due on that date. The pleas in defence were section 6 of Regulation III of 1872 as limiting the amount of interest recoverable, and the deposit under section 83 of the Transfer of Property Act as being a full discharge of the bond. The High Court, affirming the decree of the Subordinate Judge, held in the construction of the Regulations that the plaintiffs having received the principal and a sum for interest equal to the principal there was nothing more due and dismissed the suit.

Held, by the Judicial Committee, that in the absence of anything to show that he had any greater power or authority to withdraw the money than the plaintiffs themselves had, the Receiver must be taken to have withdrawn it, subject to the conditions prescribed by section 83 of the Transfer of Property Act, that is, in full discharge of the bond.

The plaintiffs were bound by the acts of their agent and could not rely upon the Receiver's default in omitting to perform any of the necessary conditions, in order to escape from the consequences which would of necessity have followed the withdrawal if everything prescribed by the Act had been rightly done.

APPEAL from a judgment and decree (14th January 1905) of the High Court of Judicature at Calcutta, which affirmed a judgment and decree (4th September 1901) of the Subordinate Judge of Dumka.

The plaintiffs were the appellants to His Majesty in Council.

The suit out of which the present appeal arose was one on a mortgage dated 27th July 1885, to which the Sonthal Pergunnahs Settlement Regulation III of 1872 was applicable. The mortgage was executed by Raja Udit Narayan Singh, who was the husband of the first respondent, and the adoptive father of the second, of his taluka of Kasha in favour of

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Harbhakt, who was the father of the fourth appellant, and the partner of appellants 1 to 3. The mortgage money was a sum of Rs. 34,000, and it was stipulated that interest should be paid yearly at the rate of Ro. 1 per cent. per mensem, and that in default of payment, compound interest should be paid at the same rate. From time to time payments were made on account of interest, and on 27th October 1890 the whole of the interest due up to that date was discharged, the amount being Rs. 23,403-15-6.

In 1886 a suit was brought for the dissolution of the partnership between the mortgagor and his partners to whom part of the money advanced on the mortgage had belonged; and by virtue of various assignments executed in 1895 and 1896 in pursuance of the decree made in that suit on 21st August 1892, the appellants 1 to 3 became interested in various proportions in the rights of the mortgagor under the mortgage. Subsequently the mortgagor died and his interest passed to the fourth appellant.

Meanwhile in August 1895 the mortgagor was desirous of discharging the mortgage and made a tender to the mortgagee, but the latter was unable to return the deed which was in the possession of his partners or one of them with whom he was litigating. The mortgagor accordingly on 17th August 1895 paid the money into Court under section 83 of the Transfer of Property Act (IV of 1882) in full discharge of the mortgage, and the mortgagor asked to have the bond returned to him. The amount so paid into Court was Rs. 44,596-0-6, which, together with the sums already paid on account of interest Rs. 23,403-15-6, amounted to Rs. 68,000. After this deposit was made a Receiver was in June 1896 appointed in the partnership suit, and on 23rd September 1896 the sum deposited was drawn out of Court by him.

Subsequently the mortgagor having died Keshobati Kumari, the first respondent, entered into possession of the estate under his will, and on 7th February 1900 the appellants brought the present suit against the widow and adopted son of the mortgagor, joining also as third defendant a subsequent

encumbrancer on the land. The plaintiffs alleged that the sum of Rs. 33,698-9 was due for principal and interest, and prayed for a decree for sale of the mortgaged property.

The amount sued for was made up in this way. When the amount was deposited by the mortgagor a notice was issued to the plaintiffs, but in reply they declared in September 1895 that the deposit was insufficient. The plaintiffs in bringing the suit, instead of adjusting their claim to 17th August 1895 when the deposit was made, made their adjustment to the date when the Receiver drew out the money, namely, 23rd September 1896. In that way they made their total claim Rs. 67,455-5-6, and after deducting the amount of the deposit claimed Rs. 22,859-5 and interest Rs. 10,839-4, amounting to Rs. 33,698-9 as being still due.

The defence was that the plaintiffs were not entitled to the decree sought for two reasons, firstly, that there had been drawn out of Court on behalf of the plaintiffs the sum paid in 1895 under section 83 of the Transfer of Property Act in full discharge of the mortgage debt; and, secondly, that the mortgagor having, as was admitted, paid the amount of the principal Rs. 34,000, and also sums on account of interest equal in amount to the principal, no further sums could be claimed under section 6 of the Sonthal Pergunnahs Settlement Regulation (III of 1872) as amended by section 24 of Regulation V of 1893.

On the pleadings issues were settled, of which only the second and third were material on this appeal:

“(2) Are the plaintiffs entitled to recover more than Rs. 68,000 the amount they admit having received?

“(3) Can the plaintiffs claim compound interest? How much, if any, compound interest have they charged and received?”

The material portion of section 6 of Regulation III of 1872, as amended by section 24 of Regulation V of 1893, is as follows:—

“All Courts having jurisdiction in the Sonthal Pergunnahs shall observe the following rules relating to usury, namely:—

- (a) No compound interest arising from any intermediate adjustment of account shall be decreed

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(b) The total interest decreed on any loan or debt shall never exceed one-fourth of the principal sum if the period be not more than one year, and shall not in any other case exceed the principal of the original debt or loan.

"Explanation: The expression 'intermediate adjustment of account' in clause (a) of this section means any adjustment of account which is not final, and includes the renewal of an existing claim by bond, decree or otherwise, when without the passing of fresh consideration, the original claim is increased by such renewal."

"Illustration: A bond is given for Rs. 75, of which Rs. 25 are interest. Unless the obligee can prove to the satisfaction of the Court that he gave such consideration for the bond as rendered the transaction fair and equitable, of the Rs. 75 Rs. 50 only will bear interest and the limit of the claim on the bond be Rs. 100."

So far as material, sections 83 and 84 of the Transfer of Property Act enact:—

"Section 83. At any time after the principal money has become payable and before a suit for redemption of the mortgaged property is barred, the mortgagor . . . may deposit, in any Court in which he might have instituted such suit, to the account of the mortgagee, the amount remaining due on the mortgage. The Court shall thereupon cause written notice of the deposit to be served on the mortgagee, and the mortgagee may, on presenting a petition . . . stating the amount then due on the mortgage, and his willingness to accept the money so deposited in full discharge of such amount, and on depositing in the same Court the mortgage-deed, if then in his possession or power, apply for and receive the money, and the mortgage-deed so deposited shall be delivered to the mortgagor.

"Section 84. When the mortgagor has tendered or deposited in Court under section 83 the amount remaining due on the mortgage, interest on the principal money shall cease from the date of the tender or as soon as the mortgagor . . . has done all that has to be done by him to enable the mortgagee to take such amount out of Court."

The District Judge held, on the construction of the above-mentioned Regulations, that the interest could not exceed the principal, and that as the plaintiffs had received Rs. 68,000 on the mortgage bond, no further sum could be decreed to them. He accordingly made a decree dismissing the suit with costs.

From that decree the plaintiffs preferred an appeal to the High Court, which was heard by Chandra Madhub Ghose and Pargiter JJ., who differed in opinion with regard to the construction to be placed on the amended section 6 of Regulation III of 1872.

Ghose J. was of opinion that the words "the total interest decreed on any loan shall not exceed the principal of the";

original debt or loan " meant the amount of interest for which a decree was given, without taking into consideration the amount of interest paid by a debtor, in regard to which no claim was advanced in the suit and no decree given Pargiter J., on the other hand, was of opinion that in every case an account should be taken of all payments made by the debtor, and that on the true construction of the section no further interest could be claimed as soon as the amount paid on account of interest was equal in amount to the principal.

Owing to this difference of opinion the case was referred to Sir F. W. Maclean C.J. for decision on this point, and he agreed with Pargiter J. The appeal was, therefore, dismissed with costs.

On this appeal,

DeGruyther, K.C., and *E. U. Eddis*, for the appellants, contended that, on the true construction of section III of 1872 and section 24 of Regulation V of 1893, the appellants were entitled to recover the full amount claimed in their plaint. The words "the total interest decreed" were to be taken in their literal sense. All that the Court had to see to was that the interest decreed in any particular suit did not exceed the limit prescribed. Section 6 as amended did not contemplate that any transaction between the parties by way of payment of interest previous to the date from which it was claimed should be taken into account. The illustration to the section is not applicable to the present case, because after the adjustment of 27th October 1890 all the interest had been paid up, and only the principal was due, and it is that amount with interest and deducting the sum paid into Court that the appellants claim a decree for. Under the law from which the Regulations under discussion were taken, there was no limit laid down as to the amount that might be paid as interest; the only limit was that no decree would be given for interest to a larger amount than the principal, and the same was the case with the Hindu Law of Dairdapat. Reference was made to Regulation XV of 1793, ss. 2, 6, 7 and 8

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Act XXVIII of 1855; *Dhondu Jagannath v. Narayan Ramchandra* (1), *Nobin Chunder Banerjee v. Bomesb Chunder Ghose* (2) and *Shama Charan Misser v. Chunilal Marwari* (3). The High Court at Calcutta on its original side does not, while applying the rule of Damdupat, take any account of the interest paid before suit in making a decree in a mortgage suit. The construction of the old law, therefore, did not support the construction contended for by the respondents, and upheld by the majority of the High Court in the present case.

It was also contended that the amount of the appellants' claim should not be reduced on equities said to arise in consequence of the deposit in Court by the mortgagor under s. 83 of the Transfer of Property Act. The appellants had throughout treated this deposit as a part-payment in satisfaction of the mortgage debt. When they received notice of it, they replied that the amount was insufficient to meet the total amount remaining due on the bond and requested that the mortgagor should be asked to deposit the balance; but they received no answer to that communication. They then presented a petition for the appointment of a Receiver for the withdrawal of the deposit from the Court, and a Receiver was duly appointed who after various unsuccessful attempts at length succeeded in obtaining the money deposited. The only lawful way, under the circumstances, of withdrawing it was by the assent of the mortgagor who had deposited it, and it might, therefore, well be assumed that the Raja's assent was obtained to its withdrawal in part satisfaction of the debt. This question, though raised in the pleadings, was not dealt with by the Courts below where the defence was rested entirely on the construction of the Regulations, and it might almost be said it was not really in issue in the Courts in India. There was no finding on it by those Courts, and, if necessary, the case might be remanded to the first Court to take further evidence on the question. As authority that under such circumstances the course

(1) (1863) 1 Bom. H. C. 47.

(2) (1887) I. L. R. 14 Cal. 781.

(3) (1898) I. L. R. 26 Cal. 238

suggested was desirable: *Owners of Ship "Tasmania" v. Smith* (1), per Lord Herschell L.C.

Kencworthy Brown, for the respondents, contended that the withdrawal of the money deposited under section 83 of the Transfer of Property Act precluded the appellants from maintaining their suit, and consequently this appeal should fail: *Dal Singh v. Pitam Singh* (2). The money could only have been legally withdrawn if the appellants accepted it in full discharge of the mortgage bond, it having been so deposited. As it was withdrawn on behalf of the appellants, it must be presumed that it was taken out with the conditions attached to it by section 83, and under section 84 interest ceased from the time it was deposited. There was no suggestion in the evidence that the Raja assented to its withdrawal. This deposit was pleaded as a defence, and was in issue throughout the case, as the second ground of appeal from the Subordinate Judge to the High Court showed. Mr. Justice Pargiter referred to the question at the end of his judgment as follows:—"One other matter may be referred to as constituting an equitable right that the defendants may assert against the plaintiffs. When the Raja made the deposit of Rs. 44,596 in August 1895, he made it as being a full satisfaction of the plaintiffs' claims. They demurred to his allegation and asserted the sum could be only a part satisfaction. What proceedings took place thereupon have not been fully explained to us, and apparently were not elucidated in the evidence; but their Receiver was permitted to draw out that amount. They are now seemingly endeavouring to take advantage of their own sharp practice. At that time they had two courses, either to accept the sum on the Raja's terms or to leave it in deposit until their own contention was established in a suit. In the former event that sum would have fully satisfied this bond; in the latter event that sum would have gone in full or partial satisfaction of any decree they might have obtained, and their claim at that time was fast approaching the maximum limit of Rs. 68,000. What they did was neither; but having

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(1) (1890) L. R. 15 A. C. 223, 225.

(2) (1902) I. L. R. 25 All 170.

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succeeded somehow or other in drawing out the money, they now contended that it was a simple part-payment, and that they have a fresh start before their claim can mount up to that maximum In my view, however, they have already received the maximum amount legally recoverable, and can obtain nothing further."

As to the construction of section 6 of the Sonthal Pergunnahs Regulation III of 1872, as amended by Regulation V of 1893, the object of it was to restrict usurious interest on loans, to limit the amount of interest recoverable to an equitable sum, and so to protect the inhabitants of a district supposed to be in need of such legislation. It was submitted that the proper construction was that put on the Regulations by the majority of the High Court on appeal, and that all sums paid by the debtor on a bond should be taken into account in making a decree, so that no more than an amount of interest equal to the principal should be recovered by the creditor. Clause (b) of section 6 with the illustration limits the amount recoverable as interest. Reference was made to Act XXVIII of 1855; and as to the law of Damdupat, *Dhondu Jagannath v. Narayan Ramchandra* (1) and *Gopal Ramchandra v. Gangaram Anand Shet Marwadi* (2).

DeGruyther, K.C., replied.

The judgment of their Lordships was delivered by

May 11.

LORD ATKINSON. This is an appeal from a decree of the High Court of Judicature at Fort William in Bengal, dated the 14th January, 1905, affirming a decree of the Subordinate Judge of Dumka, Sonthal Pergunnahs, dated the 4th September, 1901, by which the suit of the plaintiffs (the appellants) was dismissed. The facts, so far as it is necessary to state them, are as follows.

On the 27th July, 1885, Raja Udit Narayan Singh, since deceased, executed a mortgage of his taluka of Kasba in favour of one Harbhakt Das, now also deceased, for a sum of Rs. 34,000, bearing interest at the rate of 1 rupee per cent per

(1) (1863) 1 Bom. H. C. 47.

(2) (1895) 1 L. R. 20 Bom 721.

mensum. The mortgage deed contained a provision that, on default being made in the payment of interest at the stipulated dates, compound interest should be charged at the same rate, i.e., 12 per cent. per annum. At the date of the mortgage, the mortgagee carried on the business of cloth merchant and money-lender at Bhagalpur and Calcutta in partnership with the first three appellants. On the 3rd January, 1895, Harbhakt Das executed to his partner, the first appellant, a mortgage of the mortgaged lands and the money secured thereon. On the 11th June, 1896, he executed a similar mortgage in favour of Bansidhar Marwari, the second appellant. Harbhakt Das afterwards died, leaving the fourth appellant, his only son, him surviving. During Harbhakt's lifetime disputes arose and suits were instituted between him and his co-partners in reference to the business of the partnership, and especially in reference to their respective interest in the moneys secured by the above-mentioned mortgage of Raja Udit Narayan Singh. The respondents are the widow and adopted son of the Raja, and a second encumbrancer on the mortgaged lands.

Default having been made in the payment of the interest, compound interest became payable and was claimed by the mortgagee. Large sums were from time to time paid by the mortgagor in discharge of it, and ultimately, on the 27th October, 1890, arrears of interest, amounting to Rs. 11,829-14-6, were discharged by a payment of Rs. 2,606-11-6 in cash and the execution by the mortgagor of a new bond (roka) for Rs. 9,223-3-0 with interest at the same rate, i.e., 1 rupee per cent. per mensum. The interest which had accrued due up to this date, and was discharged by payments in cash and the execution of the abovementioned roka, amounted altogether to Rs. 23,403-15-6.

Towards the end of July, 1895, the mortgagor, being anxious to redeem the mortgage, sent one Banwari Lal Panrey to the mortgagee to tender to him a sum of something over Rs. 44,000 in full discharge of the only amount the mortgagor alleged to be then recoverable on his bond. This particular

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money deposited, is contained in paragraphs 9 and 10 of their plaint, and in the evidence of Ram Chandra Marwari, the principal plaintiff. From the former it appears that the appellants presented a petition to the High Court at Fort William for the appointment of a Receiver for the withdrawal of the money from the Court of the Subordinate Judge; that on the 26th June, 1896, an order was made on this petition appointing a Receiver with all the powers conferred by section 503 of the Civil Procedure Code; and lastly, that the Receiver so appointed, after various attempts, at last succeeded in withdrawing the fund from Court. But neither the petition nor the order is printed in the Record, nor is any information afforded as to the precise nature of the persistent and, unfortunately, successful efforts of the Receiver to defeat the law, while the evidence of Ram Chandra Marwari contains many important admissions. In the course of his cross-examination this witness says that in his petition to the High Court he stated :—

"That in the latter part of July 1895 the Raja was prepared to pay the whole amount due on the bond in suit, but that Harbhakt prevented his paying it, and that thereupon the said Raja had deposited the money in the Court of the Subordinate Judge of Dumka."

No doubt he states in his cross-examination that he did not in his petition "admit that the Rs. 44,000 deposited by the Raja was in full payment of our dues."

It is apparent from this evidence that the Receiver was appointed solely because Harbhakt and his partners, owing to their quarrels, would not join in an application to draw out the money deposited. There is nothing to show that the Receiver was clothed with any right or authority in reference to the money, or the withdrawal of it from Court, other than, or different from, that which belonged to those on whose behalf he was appointed. As they were bound to comply with the requirements of the statute under which it was paid into Court, so was he. It was not contended, it could not be contended with any show of reason, that either the High Court or the Subordinate Judge had, save with the consent of the mortgagor or his representatives, any jurisdiction

to permit the money deposited to be drawn out of Court on any terms other than those imposed by the statute. There is no proof that either of those Courts ever made an order purporting to exercise such a power, while there is not a particle of evidence to show that the mortgagor, or those who succeeded him, ever gave any consent, express or implied, to the money being drawn out in part discharge, as opposed to full discharge, of his, or their, liability on the bond. There is no proof that any demand was made on the mortgagor after the money was paid into Court, and it is admitted that nothing was paid in respect of the mortgage, either for principal or interest, since that date. It is not suggested that the present is not the first suit instituted to recover any portion of it. In the cross examination of Ram Chandra Marwari the following passage occurs:—

"When notice was sent us of the deposit, we sent a petition of objection to this Court. We did not get any reply to this objection. I have not filed a copy of the objection, nor have I called for the original."

This is the only evidence going to show that any objection was made to accept the sum of Rs. 44,000 in full discharge of the mortgage debt. Yet after a delay of close upon 4½ years—i.e., from the 17th August, 1805, the date of the deposit, till the 1st February, 1800, the date of the institution of this suit—and in face of this evidence, Mr. DeGruyther, on behalf of the appellants, invites their Lordships, notwithstanding the state of ignorance of the actual facts in which his clients have deliberately left them, to assume that the deceased Raja assented to the Receiver's drawing the money out of Court, in part satisfaction of the former's liability—because, it is said, the Receiver could not have obtained it otherwise without violating the law—or, if not, to send the question back for further enquiry to the Subordinate Judge.

In their Lordships' opinion they can make no such assumption as that suggested. The assumption which they are entitled to make, and indeed bound to make, is precisely the opposite. The Act provides that money lodged, as this was, "in full discharge" of a liability can only be drawn out by a creditor in full discharge of that liability. The agent of the

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appellants appointed *ad hoc* drew out this money. It is for them to show that he acted under such conditions that the statutory result does not follow from his act. If they fail to do this, as they have failed in the present case, then there is nothing to defeat or modify the operation of the statute, and the consequences must be those which it prescribes. Mr. DeGruyther objected to their Lordships considering this question, on the ground—quite legitimate if well founded—that the defendants rested their defence solely on section 6 of the above-mentioned Regulation, and that the question of the circumstances under which the Receiver drew out the money, or the legal consequences of his doing so, was not in issue in the suit.

It is quite true that no issue has been framed in which the fact of the withdrawal is specifically mentioned. But the second issue is quite wide enough to cover it. The issue runs thus:—

“Are the plaintiffs entitled to recover more than Rs. 68,000, the amount they admit having received?”

This issue, as framed, leaves it open to the defendants to contend that the plaintiffs are not entitled to recover more than Rs. 68,000, either because section 6 prohibits it, or because they have received “in full discharge” the sum paid into Court. And in the statements contained in paragraph 7 of the written statement of the first defendant, and in paragraph 5 of that of the second defendant, as well as in the evidence of Ram Chandra, Bansidhar and Banwari Lal, it is distinctly put forward that the sum of Rs. 44,000 was tendered by Banwari in full satisfaction of the bond, and that both Harbhakt and Ram Chandra were, apparently, willing to accept it as such.

In the memorandum of appeal filed in the High Court by the appellants, the second of the three grounds of appeal against the decision of the Subordinate Judge set forth runs as follows:—

“2. For that the Court below has erred in holding that the receipt of the amount already paid operated as a bar to the recovery of the amount in claim.”

It cannot, therefore, be contended that the plaintiffs had not notice that the receipt of the money deposited would be relied on as a defence.

Their Lordships are, therefore, of opinion that the plaintiffs must be held bound by the act of their agent with all its results; that if he has omitted to perform any of the conditions necessary to entitle him, on their behalf, and for their use and benefit, to draw this money out of Court, they cannot rely upon his default in this respect, to escape from the consequences which would, of necessity, have followed the withdrawal, if everything prescribed by the statute had been rightly done; and that the money drawn out must, therefore, be held to have been drawn out in full discharge of the mortgagor's liability. The sum now sued for is, consequently, not due, and the suit must accordingly be dismissed.

The conclusion at which their Lordships have arrived on this point is in itself sufficient to dispose of the appeal, and renders it unnecessary for them to express any opinion the proper construction of section 6 of the 3rd Sonthal Pergunnahs Regulation. They will, therefore, humbly advise His Majesty that the appeal should be dismissed.

The appellants must pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellants: *Sanderson, Adkin, Lee & Eddis.*

Solicitors for the 1st and 2nd respondents: *T. L. Wilson & Co.*

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Before Mr. Justice Harington and Mr. Justice Mookerjee.

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v.

THE ADMINISTRATOR GENERAL OF BENGAL.*

Diluvion—Alluvion—Eviction by Landlord—Rent, suspension of—New tenants on reformed land.

When land has been lost to a holding by diluvion and subsequently restored by alluvion, and then settled with persons other than the tenants of the holding, the tenant is not entitled to a suspension of the entire rent on the ground that the landlord has evicted him from a portion of the demised premises.

Dhunput Singh v. Mahomed Kazim Isphahain (1), *Harro Kumari Chowdhurani v. Purna Chandra Sarbogyia* (2) and *Kali Prasanna Khasnabish v. Mathura Nath Sen* (3) distinguished.

SECOND APPEAL by the defendants, Rai Charan Shar Mazumdar and another.

These two appeals arose out of two analogous rent-suits on account of arrears of two under-tenures. The defendants claimed reduction of rent on the ground of loss of land for diluvion, and also pleaded that they were entitled to suspension of rent, as reformed lands had been let out by the plaintiff to third persons who were in possession thereof.

The Munsif decreed the suits partly, allowing rent at the admitted rates, holding that it lay upon the plaintiff to show what apportionment of rents should be made and that the plaintiff had not done it. In both these cases, the plaintiff appealed. The Subordinate Judge remanded the case for definite findings as to the proper *jama* to be paid by the tenants, holding that the burden of proof is on the

* Appeal from Appellate Decrees, Nos. 916 and 856 of 1907, against the decrees of S. C. Ganguli, Subordinate Judge of Jessore, dated Jan. 10, 1907, reversing the decree of Hem Chandra Mitter, Munsif of Magura, dated March 31, 1906.

(1) (1896) I. L. R. 24 Cal. 296.

(2) (1900) I. L. R. 28 Cal. 189.

(3) (1907) I. L. R. 34 Cal. 191.

tenants in case of claim for reduction of rent. Another Munsif tried the suit after remand. He dismissed the suits, holding on the authority of *Dhunput Singh v. Mahomed Kazim Ispahain* (1) that the tenants were entitled to suspend the whole rent, as they were practically evicted from a portion of the lands. The appeals were heard by another Subordinate Judge. He decreed the appeals in part, holding that the Munsif had no right to allow the ease for suspension of rent, as he was restricted by the order of remand to the amount of *jama* only. The defendants appealed to the High Court.

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Babu Sarat Chandra Roy Chowdhuri (*Babu Janakinath Pal Sastri* with him), for the appellants. When there is no question that the land reformed is a part of the holding, the landlord must be taken to have dispossessed the tenants from a part, he having settled the same with a third person after reformation. The fact that the land was lost to the holding by an act of God does not affect the principle laid down in *Dhunput Singh v. Mahomed Kazim Ispahain* (1), when the land reappeared and became part of the holding: see also *Harro Kumari Chowdhurani v. Purna Chandra Sarbogy* (2) and *Kali Prasanna Khasnabish v. Mathura Nath Sen* (3). The principle that the landlord cannot apportion his own wrong applies here as much as it applies to cases of trespass by landlord.

Babu Jogesh Chandra De, for the respondent. The cases cited by the appellant do not apply. The landlord cannot be said in this case to be a wrong-doer.

Babu Sarat Chandra Roy Chowdhuri, in reply.

Cur. adv. vult.

HARINGTON J. I have read the judgment my learned brother is about to deliver and I agree that the decrees of the lower Court should be affirmed subject to the modification which he proposes.

(1) (1896) I. L. R. 24 Calc. 296.

(2) (1900) I. L. R. 28 Calc. 188.

(3) (1907) I. L. R. 34 Calc. 191.

that after reformation, the plaintiff had settled them with third parties, that such conduct on the part of the landlord fell within the description of eviction, that consequently the entire rent was suspended and the claim of the plaintiff could not be sustained.

The Court of first instance overruled these objections and made a decree for the amount, which, according to the admission of the defendants, was proportionate to the quantity of land still in their occupation. Upon appeal, the Subordinate Judge directed an enquiry into the question of the quantity of land which had been washed away and of which the defendants had lost possession. After remand, the Court of first instance held that the plaintiff was not entitled to succeed at all, inasmuch as the defendants had been evicted from a part of their tenancies. Upon appeal, the Subordinate Judge reversed this decision on the ground that the Court of first instance had no jurisdiction to decide any point which had not been expressly referred to it, and in this view made a decree for rent in respect of the lands in the actual occupation of the defendants.

The defendants have now appealed to this Court, and on their behalf the decision of the Subordinate Judge has been assailed substantially on the ground that, upon the facts found, there has been an eviction of the defendants from a part of the demised premises and consequently a suspension of the entire rent. Two minor points have also been urged, namely, *first*, that the decree of the Court of appeal below contains a clerical error and that the amount decreed is more than what is really due; and, *secondly*, that the costs of the local investigation by which the actual area of the lands in the occupation of the defendants was determined ought not to have been thrown entirely upon the tenants who have been successful in their contention that in any view there must be an abatement of rent.

In support of the first contention, reliance has been placed upon the cases of *Dhunput Singh v. Mahomed Kazim Isphahain* (1),

(1) (1896) I. L. R. 24 Cal. 295.

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Harro Kumari Chowdhurani v. Purna Chandra Sarbogyia (1), and *Kali Prasanna Khasnabish v. Mathura Nath Sen* (2). In the first of these cases, it was ruled upon a review of the earlier decisions in this Court, as well as the decisions in the cases of *Upton v. Townend* (3), *Edge v. Boileau* (4), and *Neale v. MacKenzie* (5), that if a tenant is evicted by his landlord from part of the demised premises, the entire rent is suspended. In the second case, it was ruled that the same principle is applicable, even though the tenure, from a part of which the tenant has been evicted, was created under a lease under which the rent was reserved at a certain rate per bigha. In the third case, it was held that, although in the case of a partial eviction for which the landlord is responsible, the entire rent is suspended, if the partial eviction has been caused by an act of a stranger, the rent is only abated *pro tanto*. Let it be assumed on the authority of these cases that if a tenant has been evicted by his landlord from a part of the demised premises, the entire rent is suspended. But the question remains, whether a tenant can be said to be evicted by his landlord within the meaning of this rule when he loses possession in the first instance by reason of an act of nature, namely, as in this instance, the action of a river, and subsequently upon reformation of the land, the landlord settles it with a stranger. In order to determine whether the rule ought to be extended to a case of this description, the principle upon which it is founded requires examination. The reason was stated in old cases to be that the landlord ought not to be encouraged to injure his tenant whom by the policy of the feudal law he ought to protect. The reason given in modern cases is that the landlord cannot be permitted to apportion his own wrong. The older reason will be found set forth in Bacon's Abridgment, Ed. 1832, Vol. VII, p. 62, where it is stated that "no man may be encouraged to injure or disturb his tenant in his

(1) (1906) I. L. R. 23 Cal. 188.

(2) (1907) I. L. R. 31 Cal. 191.

(3) (1855) 17 C. B. 30.

104 R. R. 562.

(4) (1885) 16 Q. B. D. 117.

(5) (1876) 1 M. & W. 747.

46 R. R. 478.

possession whom by the policy of the feudal law he ought to protect and defend." The later reason will be found set forth by Chief Justice Hale in *Hodgkins v. Robson* (1), in which he stated that "if the lessor enters into a part by wrong, this would suspend the whole rent, for in such a case he shall not so apportion his own wrong as to enforce the lessee to pay anything for the residue." The reason for the rule was investigated by Mr. Justice Holmes in *Smith v. McEnayne* (2), where the learned Judge refers not merely to the two reasons just mentioned, one based on considerations partly of a feudal nature and the other on the ground that the landlord cannot apportion his own wrong, but also to the following statement by Lord Chief Baron Gilbert in his *Treatise on Rents* at page 178: "Because by the demise, every part of the land was equally chargeable with the whole rent, therefore the lessor shall not by his own act discharge any part from the burden during the continuance of such contract. This indeed may be a good reason why the whole rent service shall be suspended, if the lord or lessor disseizes, or ousts his tenant or lessee of any part of the land, because there is a wrongful act to which the tenant consented not, and if it were not attended with a total suspension of the rent until he makes restitution of the land, it would be in the power of the lord or lessor to resume any part of the land against his own engagement and contract, and so by taking that which lies most commodious for the tenant, render the remainder in effect useless, or put him to expense and trouble to restore himself to such part by course of law." If these reasons for the rule are borne in mind, can it be contended on any intelligible principle of law that it should be extended to cover a case where the tenant in the first instance loses possession of part of the demised premises by an act of nature which neither he nor his landlord could control. It cannot be suggested that this is a case in which the landlord by his own wrong has withdrawn a part of the land demised and ought not consequently to recover rent either on the lease or outside of it for the occupation of the residue. Nor can it

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(1) (1657) 1 Vent. 276. (2) (1897) 170 Mass. 26; 24 Am. S. Rep. 270.

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Harro Kumari Chowdhurani v. Purna Chandra Sarbogy (1), and *Kali Prasanna Kishanbishi v. Mathura Nath Sen* (2). In the first of these cases, it was ruled upon a review of the earlier decisions in this Court, as well as the decisions in the cases of *Upton v. Townsend* (3), *Edge v. Boulton* (4), and *Neale v. Mackenzie* (5), that if a tenant is evicted by his landlord from part of the demised premises, the entire rent is suspended. In the second case, it was ruled that the same principle is applicable, even though the tenure, from a part of which the tenant has been evicted, was created under a lease under which the rent was reserved at a certain rate per bigha. In the third case, it was held that, although in the case of a partial eviction for which the landlord is responsible, the entire rent is suspended, if the partial eviction has been caused by an act of a stranger, the rent is only abated *pro tanto*. Let it be assumed on the authority of these cases that if a tenant has been evicted by his landlord from a part of the demised premises, the entire rent is suspended. But the question remains, whether a tenant can be said to be evicted by his landlord within the meaning of this rule when he loses possession in the first instance by reason of an act of nature, namely, as in this instance, the action of a river, and subsequently upon reclamation of the land, the landlord settles it with a stranger. In order to determine whether the rule ought to be extended to a case of this description, the principle upon which it is founded requires examination. The reason was stated in old cases to be that the landlord ought not to be encouraged to injure his tenant whom by the policy of the feudal law he ought to protect. The reason given in modern cases is that the landlord cannot be permitted to apportion his own wrong. The older reason will be found set forth in Bacon's Abridgment, Ed. 1832, Vol. VII, p. 62, where it is stated that "no man may be encouraged to injure or disturb his tenant in his

(1) (1900) I. L. R. 28 Cal. 188.

(4) (1885) 16 Q. B. D. 117.

(2) (1907) I. L. R. 34 Cal. 191.

(5) (1836) 1 M. & W. 747;

(3) (1855) 17 C. B. 30;

46 R. R. 178.

104 R. R. 562.

possession whom by the policy of the feudal law he ought to protect and defend." The later reason will be found set forth by Chief Justice Hale in *Hodgkins v. Robson* (1), in which he stated that "if the lessor enters into a part by wrong, this would suspend the whole rent, for in such a case he shall not so apportion his own wrong as to enforce the lessee to pay anything for the residue." The reason for the rule was investigated by Mr. Justice Holmes in *Smith v. McEnayne* (2), where the learned Judge refers not merely to the two reasons just mentioned, one based on considerations partly of a feudal nature and the other on the ground that the landlord cannot apportion his own wrong, but also to the following statement by Lord Chief Baron Gilbert in his Treatise on Rents at page 178: "Because by the demise, every part of the land was equally chargeable with the whole rent, therefore the lessor shall not by his own act discharge any part from the burden during the continuance of such contract. This indeed may be a good reason why the whole rent service shall be suspended, if the lord or lessor disseizes, or ousts his tenant or lessee of any part of the land, because there is a wrongful act to which the tenant consented not, and if it were not attended with a total suspension of the rent until he makes restitution of the land, it would be in the power of the lord or lessor to resume any part of the land against his own engagement and contract, and so by taking that which lies most commodious for the tenant, render the remainder in effect useless, or put him to expense and trouble to restore himself to such part by course of law." If these reasons for the rule are borne in mind, can it be contended on any intelligible principle of law that it should be extended to cover a case where the tenant in the first instance loses possession of part of the demised premises by an act of nature which neither he nor his landlord could control. It cannot be suggested that this is a case in which the landlord by his own wrong has withdrawn a part of the land demised and ought not consequently to recover rent either on the lease or outside of it for the occupation of the residue. Nor can it

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(1) (1667) 1 Vent. 276 (2) (1897) 170 Mass. 29; 24 Am. S. Rep. 270.

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be suggested that this is a case in which the lessor discharges a part of the land from the burden and charges the rest with the rent which issues out of the whole land. It is further worthy of note that under section 52 of the Bengal Tenancy Act, the Legislaturo has provided that, in a contingency of this description, the tenant would be entitled to proportionate abatement of rent. The abatement, therefore, when it first commences is not due to the action of the landlord, nor is it claimed by the tenant by reason of reduction in the area of the tenancy caused by a wrongful act of the landlord. This is, therefore, manifestly a case to which it would be unjust on principle to extend the rule, which, it may be observed, has been adopted in England not without considerable divergence of opinion. For instance, in *Stokes v. Cooper* (1) it was ruled by Chief Justice Dallas that the whole rent was not suspended, if the tenant continued in possession of the residue of the demised premises, but that he would be liable on *quantum meruit*. This was stated as the law in standard treatises on the law of landlord and tenant subsequently published, and was accepted as the correct view by the Court of King's Bench in Ireland in *Grand Canal Company v. Fitzsimons* (2). It was not till Baron Parke questioned the decision of Chief Justice Dallas in *Reeve v. Bird* (3) that the tide turned, and the point was finally settled in *Upton v. Townend* (4). It would not be right to extend the application of a rule of this description which may often operate harshly, to cases to which the principle on which it is founded is clearly inapplicable. If a contrary view were maintained, there might be manifest hardship and injustice, for instance, when land has been diluviated and reformed, it is often a matter of considerable difficulty even for Courts of Justice to determine whether the land which has re-appeared is a reformation on the old site. If, under circumstances like these, the landlord lets out the newly formed land to a stranger at the risk of the entire

(1) (1814) 3 Camp. 514 (n);

14 R. R. 829 (n).

(2) (1829) 1 Hud. & Br. 449.

(3) (1834) 1 C. M. & R. 31, 36.

(4) (1855) 17 C. B. 39.

suspension of the rent of the former tenant, he may be unjustly punished when there was no intention on his part to commit any wrongful act: *Henderson v. Mcars* (1). It is clear, therefore, that the principle invoked by the defendants, namely, that as the landlord is responsible for the partial eviction of his tenant from the demised premises, there is a suspension of the entire rent, has no application to this case. The principal ground taken on behalf of the appellants must consequently be overruled.

The next ground taken on behalf of the appellants is that although the Subordinate Judge held in his judgment that the defendants were entitled to abatement of rent for the lands originally diluviated and now no longer in their possession, they have not been granted this relief by reason of a clerical error in the decree. This contention is well-founded. The amín, who made the local investigation and whose return was accepted by the Subordinate Judge, stated that in suit No. 909 out of which appeal No. 856 arises, the total quantity of land was 8 khadas and odd, of which 8 kanis and odd had been washed away and the remaining 8 khadas and odd is in existence out of which the defendants have been dispossessed from two kanis. The quantity of land, therefore, in the possession of the defendants is the difference between these two, namely, 6 khadas and odd. The decree, however, has been drawn up on the footing that the defendants had in their possession 8 khadas and odd. Similarly in suit No. 911, out of which appeal No. 916 arises, the defendants are in occupation of 14 khadas and odd less 3 khadas and odd, that is, about 10 khadas and odd. But the decree has been drawn up on the assumption that they are in occupation of 14 khadas and odd. The learned vakíl for the respondent conceded that any clerical error in the decree due to miscalculation must be corrected. This will accordingly be done.

Lastly, it is pointed out that, by an oversight of the Court below, no order has been made as to the costs of the local investigation which were deposited in the first instance by the

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defendants, and the burden of the whole of these costs ought not to be thrown upon them. This contention also cannot be resisted. The position taken up by the defendants in the Court of first instance was that the plaintiff was not entitled to the whole of the amount claimed as rent, because a substantial portion of the lands had been diluviated. This defence has succeeded, and the plaintiff has got a decree for only a portion of the amount originally claimed. It is right, therefore, that the defendants should get a portion at any rate of the costs incurred by them in successfully substantiating their defence. In the circumstances of the case, the costs of the local investigation should be borne equally by the parties. As the whole of these costs appears to have been deposited by the defendant, the decree will provide that they will be entitled to credit for one-half of this amount as against the plaintiff.

Subject to the two amendments mentioned, the decrees of the Courts below will be affirmed, and these appeals dismissed. As the substantial question raised by the appellants has been decided against them and as the amendments in the decree now made might have been secured by an application to the Court below, the appellants must pay the respondent his costs of these appeals.

S. M.

Appeals dismissed.

APPELLATE CRIMINAL.

*Before Sir Laurence H. Jenkins, K. C.I.E., Chief Justice, and
Mr. Justice Moolerjee.*

SILAJIT MAHTO

v.

EMPEROR.*

1909
May 12.

*Rioting—Common object established different from that laid in the charge—
Common object not to enforce, but to maintain the actual enjoyment of a right—
Right of private defence—Excess of that right—Penal Code (Act XLV of
1860) ss. 103 (4), 141 (4), 147, 323 and 324.*

It is not a general proposition of law that a conviction under section 147 of the Penal Code cannot be supported whenever the common object, as stated in the charge, is not precisely made out. The question in each case is whether the common object established agrees in essential particulars with that laid in the charge.

Where the common object set out in the charge was to assault the complainant and his party, who were cutting the paddy of their land, and thereby to forcibly oust them, but the common object established by the facts found by the Sessions Judge was to maintain possession of the land by the accused:—

Held, that the common object in the charge had not been substantially made out, and that the conviction under s. 147 of the Penal Code was, therefore, bad.

Where the accused, who were found to be in possession of the disputed land, went upon it in a large body armed with lathis, prepared in anticipation of a fight, and were reaping the paddy grown by them, when the complainant's party came up and attempted to cut the same, whereupon a fight ensued and one man was seriously wounded and died subsequently:—

Held, that on the facts established, the common object was not to enforce a right or supposed right but to maintain undisturbed the actual enjoyment of a right, and that the assembly was not, therefore, unlawful under s. 141 (4).

Where one accused, under the circumstances, caused simple hurt, and another, a fracture of the skull which ended fatally:—

Held, that the former was within his right of private defence, but that the latter had not proved facts bringing the case under s. 103 (4).

THE appellants, Silajit Mahto, Sudhakar, and four others, were tried before the Additional Sessions Judge of Chota

* Criminal Appeal No. 208 of 1909, against the order of J. N. Ghose, Additional Sessions Judge of Chota Nagpur, dated Feb. 8, 1902.

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Nagpur, with the aid of two assessors, and were convicted, on the 8th February 1909, all of them under section 147 of the Penal Code, and Silajit and Sudhakar further under sections 304 and 323 respectively. The two latter were sentenced to five and two years' respectively, and the rest to one year's, rigorous imprisonment each.

The facts of the case, as found by the Sessions Judge, were as follows. There was a long-standing dispute and litigation between the parties of the complainant and the accused regarding certain lands. The accused were in possession, but the complainant's party claimed the land from time to time, though they never succeeded in obtaining possession of it. On the morning of the 26th November 1908, both parties went to the land in large numbers armed with *lathis*, prepared for and anticipating a fight. The accused arrived earlier, and were engaged in cutting the crops when the complainant's party came up and a fight occurred in which Silajit fractured the skull of Brindaban Mahto with a *lathi*, ultimately causing his death, and Sudhakar and Motia Kumar inflicted simple hurt on Baburam Mahto. The accused were charged with "rioting with the common object of assaulting the complainant, Achambit Mahto and his men, who were cutting the paddy of their land, and thereby forcibly ousting them therefrom." The Sessions Judge found that the common object of the accused was not that stated in the charge, but to enforce their right by show and use of criminal force. He held, that the party of the accused went to the field armed and prepared to beat down the opposition which they anticipated to their cutting the paddy, and that they could not, therefore, according to the prevailing judicial opinion, claim any right of private defence, and in any case that, unless they kept within the limits of the right, they would constitute an unlawful assembly within section 141 (4) of the Penal Code. He held, further, that in fracturing the skull of one of the opposite party, while the wounds they received were slight, they had exceeded the right.

Babu Jyoti Prosad Sarbadhikari, for the appellants.

Babu Manmatha Nath Mukerji, for the Crown.

JENKINS C.J. AND MOOKERJEE J. The six appellants before this Court have all been convicted under section 147 of the Indian Penal Code. One of them, Silajit Mahto, has also been convicted under section 304, and another, Sudhakar, has been convicted under section 323. Silajit has been sentenced to rigorous imprisonment for five years, Sudhakar to rigorous imprisonment for two years, and the other four appellants to one year each.

There is no real dispute as to the facts. The learned Sessions Judge has found that the appellants were in possession of their land, and were engaged in cutting the paddy which they had grown. The complainant's party came and attempted to cut the paddy; there was a fight, the result of which was that one man was seriously wounded and subsequently died. The learned Sessions Judge has held upon these facts that the accused are liable to be convicted under section 147 of the Indian Penal Code, inasmuch as they were members of an unlawful assembly, the common object of which was to enforce a right to property.

It has been argued before us that the conviction under section 147 cannot be sustained on two grounds: *first*, that the common object as stated in the charge has not been established; and, *secondly*, that upon the facts found there was no unlawful assembly. In our opinion, each of these contentions is well-founded. The common object, as stated in the charge, was to assault the complainant and his men who were cutting the paddy of their land and thereby forcibly to oust them from the land. The common object which has been established upon the evidence, according to the Sessions Judge, was to maintain possession of the land by the accused persons. It cannot be laid down as a general proposition of law that a conviction under section 147 cannot be supported whenever the common object, as stated in the charge, is not precisely made out. The question in each individual case is whether the common object established agrees in essential particulars with the common object as stated in the charge. In the present case there can be no doubt that the common

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object, as stated in the charge, has not been substantially established. It may, however, be further pointed out that under section 141, sub-section (4) of the Indian Penal Code, which alone is supposed to have any application to the present case, an assembly is unlawful if the common object is shown to be to enforce any right or supposed right. Upon the facts which have been established, the common object here was not to enforce any right or supposed right. It was rather to maintain undisturbed the actual enjoyment of a right. If so, no question of unlawful assembly arises. Under these circumstances, we must hold that the conviction under section 147 as regards all the appellants must be set aside.

As regards the second appellant, Sudhakar, he has been, as already stated, convicted also under section 323. It is argued on his behalf that he is entitled to claim the benefit of the right of private defence. In our opinion this defence is made out. He appears upon the evidence to have caused simple hurt to one of the assailants. He belonged to a party which was attacked by the complainants while he was in peaceful possession of his land. Under these circumstances, it cannot be said that he lost the right of private defence by causing simple hurt to one of his assailants. So far as Sudhakar is concerned, the conviction under section 323 must also be set aside.

So far as the appellant Silajit is concerned, his case stands on a somewhat different footing. It has been contended on his behalf that he is entitled to the benefit of section 103, sub-section (4) of the Indian Penal Code. Unfortunately for him, however, the defence which he took in the Court below was that he was not present at the time of the occurrence. No evidence was, therefore, adduced on his behalf to establish the elements which must be proved before section 103 can be made applicable. It is not shown that he was under any apprehension that death or grievous hurt would be the consequence if he did not exercise his right of private defence. In his case, therefore, the conviction under section 304 must be maintained. As regards the sentence, however, we are of opinion that a 'sentence of five years' rigorous imprisonment is, in the

circumstances of this case, too severe. Ho acted evidently upon grave provocation : he was in possession of the property, and he was attacked by a large number of armed people who tried to dispossess him and to carry away his crops. Under these circumstances, we reduce his sentence to two years' rigorous imprisonment. We acquit the other appellants and direct their release.

E. H. M.

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CRIMINAL REVISION.

Before Mr. Justice Caspersz and Mr. Justice Ryves.

DASARATH RAI

v

EMPEROR.*

1909
May 25.

Jurisdiction—Appeal—Trial of Summons Case—Conviction of Assault and Mischief on summons for Criminal Trespass—Competence of Magistrate who issued process, but did not take cognizance or direct a local investigation, to hear appeal on conviction—Transfer—Irregularity—Criminal Procedure Code (Act V of 1898) ss. 192, 243, 244, 246, 529 (f), 556.

Where an accused has been summoned for criminal trespass, it is open to the trying Magistrate, under s. 246 of the Criminal Procedure Code, to convict him of assault and mischief without re-opening the trial and following the procedure laid down in ss. 243 and 244.

Mudoosoodun Sha v. Hari Dass Dass (1) referred to.

A Magistrate who did not take cognizance of a complaint or order a local investigation but, acting as the officer in charge of the *sudder* sub-division, directed the issue of summonses, holding that the investigating Magistrate had not given satisfactory reasons for recommending the dismissal of the complaint without, however, expressing any clear opinion hostile to the accused, is not incompetent, under s. 556 of the Criminal Procedure Code, to hear the appeal on conviction of the accused.

The irregularity of transferring a case, when the Magistrate is not empowered under s. 192 to do so, is cured by s. 529 (f).

On the 13th December 1908 the petitioners, Dasarath Rai and another, who were servants of one Surja Prosad, the

* Criminal Revision No. 367 of 1909, against the order of J. T. Whitty, Joint Magistrate of Darbhanga, dated March 23, 1909.

(1) (1874) 22 W. R., Cr., 40.

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malik of mouza Dhanauli, went with others upon two plots of land belonging to the complainant, Pathu Sahu, and looted the crops grown by him. Two days afterwards Pathu filed a complaint before Babu Durga Prosad, a Deputy Magistrate of Darbhanga, alleging that the accused with others went to his *khet* and began looting his paddy, that he remonstrated, whereupon two of them struck him with *lathis*, at the orders of the petitioner Dasarath, while some others held him and slapped and fisted him. The Magistrate, considering the story doubtful, made the case over to Babu Rameswar Prosad, a Sub-Deputy Magistrate, for local investigation and report. The latter, after holding an inquiry, submitted a report, on the 24th December, recommending the dismissal of the complaint. The report came before Mr. J. T. Whitty, Joint Magistrate of Darbhanga, who was then in charge of criminal business of the *sudder* sub-division, and he passed the following order:—

“The inquiring Magistrate was of opinion that the complainant was actually in possession of the land in question, but that he was dispossessed before sowing paddy. I can find no sufficient grounds for this belief. If he was at one time in possession, it is doubtful if he would allow himself to be dispossessed and subsequently, after many months, bring a false case. There has been previous litigation and the case is a doubtful one, but the inquiring Magistrate has not given satisfactory reasons for dismissing it. Summon Dasarath, Hari Jha—s. 447, Indian Penal Code.”

Mr. Whitty subsequently, on the 3rd February 1909, transferred the case to Mr. A. M. Rashad for trial. This Magistrate, after hearing the evidence but without drawing up any charge, convicted the accused under sections 352, 426 and 447 of the Penal Code, and sentenced them only under section 426 to one month's rigorous imprisonment each.

The accused appealed from the conviction and sentences, and the appeal was heard and dismissed by Mr. Whitty on the 22nd March.

Babu Dasharathi Sanyal, Babu Akhoy Kumar Banerjee and Babu Buldeo Singh, for the petitioners.

Babu Srish Chandra Chowdhry, for the Crown.

CASPERSZ AND RYVES JJ. This is a Rulo calling upon the District Magistrate to show cause why the conviction and sentence of the petitioners should not be set aside on three grounds: *first*, that the Joint Magistrate had no jurisdiction to try the appeal, inasmuch as he had taken cognizance of the complaint against the petitioners; *secondly*, that the offence for which the petitioners were tried was one within section 447 of the Indian Penal Code, whereas they have been convicted under sections 426 and 352, which is also contrary to the provisions of section 246 of the Criminal Procedure Code; and, *thirdly*, that there is no finding as to the necessary intent under section 447 of the Indian Penal Code. Cause has been shown by the learned Junior Government Pleader.

It appears that the complainant charged the petitioners with certain offences. On the 15th December 1908, Babu Durga Prosad, a Deputy Magistrate, who received the complaint and examined the complainant, recorded an order:—
“Story seems doubtful. To Sub-Deputy Magistrate, Babu Rameswar Prosad, for favour of local investigation and report by 21st December 1908.” The Sub-Deputy Magistrate having examined witnesses submitted a report recommending the dismissal of the complaint. The matter came before Mr. Whitty, Joint Magistrate (then in charge of the criminal business of the *sudder* sub-division) who, without expressing any clear opinion hostile to the petitioners, thought that they ought to be summoned to stand their trial. In the opinion of Mr. Whitty, the Sub-Deputy Magistrate had not given satisfactory reasons for recommending the complaint to be dismissed. On the date fixed, the matter again came before Babu Durga Prosad, Deputy Magistrate, who took bail from the accused persons present in his Court. On the next date fixed, the 3rd February 1909, Mr. Whitty (as *sudder* Sub-divisional Magistrate) transferred the case for disposal to Mr. A. M. Rashad who convicted the petitioners under sections 426, 352, and 447 of the Indian Penal Code, although they had been summoned to answer a charge under section 447 only.

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In these circumstances, we are of opinion that the Joint Magistrate, Mr. Whitty, had jurisdiction to hear the appeal. It is true that he summoned the petitioners as accused persons, but that was because he was in charge of criminal business as we have already mentioned. The cognizance of the case had already been taken on complaint by the senior Deputy Magistrate, and Mr. Whitty did not take action under section 190, sub-section (1), clause (c) of the Criminal Procedure Code, as has been argued that he must have done. If he had no power to transfer the case from the file of Babu Durga Prosad, the irregularity is covered by section 529 (f) of the Criminal Procedure Code. The objection is very technical and has no substance. Moreover, the Joint Magistrate (Mr. Whitty), not having expressed any judicial opinion upon the facts stated in the report of the Sub-Deputy Magistrate, was not incompetent to hear an appeal from the judgment ultimately convicting the petitioners. He was not debarred from so doing by the provisions of section 556 of the Criminal Procedure Code. It may be mentioned in this connection that no objection was taken to Mr. Whitty's trying the appeal, either in the Court below or here, on the ground that he should not try the appeal because he had already formed or expressed an opinion on the merits of the case hostile to the petitioners.

In the next place, in our opinion, it was open to the trying Magistrate to convict the petitioners of the offences of assault and mischief, although they had been summoned to answer a charge of criminal trespass only. The learned vakil relies on the note to section 246 in Sir Henry Prinsep's 14th Edition of the Criminal Procedure Code; but it appears to us, on a plain construction of section 246, that the Magistrate is not bound, when he thinks that other offences have been proved, to re-open the trial and follow the procedure of sections 243 and 244. Such a view would necessitate a re-hearing of all the evidence in the same trial, and is clearly opposed to the manifest intention of the Legislature. It was held, under the Code of 1872, in the case of *Mudoooodun Sha v. Hari*

Dass Dass (1), that it is open to the Magistrate to "convict an accused person, who has been summoned before him on the footing of a complaint, of any offence which is the subject of the definition in section 148 (now section 4 (h) of the Code), if he thinks that the facts established by the complainant and his evidence only amount to an offence within that section," notwithstanding the terms of the summons in answer to which the accused appears in Court.

We think, therefore, that this Rule must fail upon the second ground also.

With regard to the third ground of this Rule, we think that the finding of the Deputy Magistrate as to the necessary intention of the petitioners is sufficient to convict them, and the conclusions at which the Joint Magistrate arrived, on appeal, were to the same effect.

The result is that we discharge this Rule, and direct the petitioners to surrender and serve out their punishment.

E. H. M.

Rule discharged.

(1) (1874) 22 W. R., Cr., 40.

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MATRIMONIAL JURISDICTION.

Before Mr. Justice Harington.

BOWEN v. BOWEN.*

1009

June 14.

Divorce—Collusion—Husband's petition—Agreement between the Parties, not acted on, whether constitutes Collusion.

A petition for divorce was presented by the husband, on the ground of the wife's adultery with the co-respondent. Subsequently an agreement was come to between the petitioner and the respondent, by which, for a pecuniary consideration, the respondent agreed not to defend the suit and to furnish the petitioner with evidence against herself and the co-respondent, should the latter venture to defend the suit. This agreement, however, fell through, and the respondent filed her answer denying adultery, and making a counter-charge of adultery against the petitioner. The co-respondent did not defend the suit. At the trial, the plea taken by the respondent was that the petition should be dismissed on the ground of collusion between the petitioner and herself :—

Held, that inasmuch as the agreement, which contemplated a fraud upon the Court, was not acted on, and in no way affected the decision of the Court, it did not constitute collusion.

Churchward v. Churchward (1) referred to.

ORIGINAL SUIT.

This was a petition by the husband for dissolution of marriage by reason of his wife's adultery with the co-respondent, George Evanco. The parties were married in Calcutta in April 1903, the respondent being at the time fifteen years of age and the petitioner thirty-two, and they lived together in various places in the suburbs of Calcutta. There was one child of the marriage, a boy, born in June 1904.

From October 1907, the parties, though residing together, ceased to live as man and wife. In February 1908, the wife left her husband's protection and remained away till October of the same year, when there was a reconciliation, and the wife returned to her husband at No. 9, Dent's Mission Road, Kidderpore, a boarding-house, in which the co-respondent was also a lodger. Subsequently, the petitioner having suspicions as

* Original Civil Suit No. 1 of 1909.

(1) [1895] P. 7.

to his wife's conduct with Evance, moved to Garden Reach taking the respondent with him.

The petitioner and respondent appear to have been unable to get on together. Early in December 1908, they went to Messrs. Ghose and Kar, solicitors, to consult them as to getting a divorce. At this interview, the wife proposed that her husband should go to a house of ill-fame, and that she should have him watched, so as to obtain evidence with a view to divorce proceedings. The husband, however, refused to accede to the proposal.

Later in December, the husband's suspicions were again aroused. He followed his wife on two occasions, on the 16th and 17th December between 8-30 P.M. and 9 P.M., to No. 0, Dent's Mission Road, and discovered that his wife was in the room occupied by Evance. On his return home, on the second occasion, he packed up his things and left the house. On the 19th December, the husband again followed his wife, and saw her in the same room. At a subsequent interview, he informed his wife that he had put the matter in his solicitor's hands.

The petition for divorce was filed on the 7th January 1909, and was followed by a singular correspondence between the petitioner and respondent. On the 19th January the wife wrote as follows: "I believe you have filed your suit for a divorce. What have you done with my summons? I have not received any up to date. You know my address. I hope you will send it to me here and not to Cleavers at Kidderpore. I hope whatever you have against me is nothing but the truth, and not by what you have heard. What you might gain now by lies, you will be punished for hereafter. Well I hope you will gain your desires and be happy." There was another letter from the wife, dated the 26th January, asking for an interview with reference to the child, which was answered by the husband on the 27th January, suggesting that she should call and bring the boy with her. On the 31st January, Mrs. Bowen wrote in the following terms: "I did not send you the letter as promised yesterday as I have since heard Evance is not going to defend; he is going to withdraw his defence, but if I find

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he is going to defend the case, I will send you the letter as promised. I do not see the man any more. I would like to see you about all this, but I think it would be best we don't meet just now. God knows what he is working up. Who knows he might watch us meeting. Whatever I have to say I will write till the road is clear. Don't be afraid of me. I won't play you a double game, if you will only keep to your word. When writing to me, don't do so by the *boodhak* but by post as he might be seen coming here. If Evanoe withdraws his case, it ought to then come off soon. Let me know how things go on. I will give you something else which will settle the swine properly should he defend. I don't think he will. He hasn't a brass farthing. Ta Ta for the present. Yours, Winnie." There was also an undated letter from Mrs. Bowen, stating that she was trying to get the co-respondent's solicitors not to defend the suit.

On the 9th February 1909, the wife filed her answer. She denied the charge of adultery, and made a counter-charge of adultery against her husband and submitted that he was by reason of this misconduct disentitled to the relief he claimed. The co-respondent Evanoe did not defend the suit.

At the hearing, the respondent took the further plea that the petition should be dismissed on the ground of collusion between the petitioner and herself. It appeared from the correspondence and the evidence given at the trial that sometime after the 19th January 1909, there was an agreement come to between the petitioner and respondent, by which for a pecuniary consideration the respondent was prepared not only not to defend the suit but to furnish the petitioner with evidence which she believed would be conclusive against herself and the co-respondent, should he venture to defend the suit. This agreement, however, fell through, and was never acted on.

Mr. Pugh (*Mr. Hyam* with him), for the respondent. This petition should be dismissed under section 13 of the Indian Divorce Act. Both previous and subsequent to the petition being presented, there were collusive negotiations between the petitioner and the respondent. It is sufficient that

at some stage of the proceedings, the petition should have been prosecuted in collusion: *Churchward v. Churchward* (1).

Mr. Stokes, for the petitioner. The true test as to whether there has been collusion between the parties so as to disentitle the petitioner from obtaining relief, is whether the decision of the Court has been affected by the agreement between the parties. There would be collusion, if, by agreement between the parties, material facts were not brought before the Court: the effect would be to commit a fraud on the Court. In the present case, the agreement, inasmuch as it fell through, cannot affect the decision of the Court. The respondent, who has taken this plea, has defended the suit and is in a position to place all the facts before the Court. *Churchward v. Churchward* (1) is distinguishable: there, the petition was presented under an agreement between the parties, the respondent not appearing to defend the suit, and it was on the intervention of the Queen's Proctor, that it was held that the agreement constituted collusion.

Cur. adv. vult.

HARINGTON J. This is a petition by the husband for dissolution of his marriage by reason of his wife's adultery with one George Evanco.

The respondent denies the adultery, makes a counter-charge of adultery against her husband and alleges he is by reason of this misconduct disentitled to the relief he claims.

The co-respondent does not defend the suit.

The marriage took place in April 1903, the respondent being at that time fifteen years of age while the petitioner was thirty-two. There was issue of the marriage one child born in June 1904.

According to the petitioner the respondent refused him his marital rights as far back as 1904. The wife denies this and says they lived together until 1907, but the question is of small importance as it is common ground that after the wife's

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return from Mussorie in that year, though residing together, they were not living as man and wife.

Their differences came to ahead in February 1908 : the wife left her husband's protection and remained away until October in that year when there was a reconciliation. At this time the parties were residing at No. 9, Dent's Mission Road—a house kept by a Mrs. Barnes in which the co-respondent was a lodger. The petitioner, having, as he says, suspicions as to his wife's conduct with Evance moved to Garden Reach taking the respondent with him. They appear to have been unable to get on together : they went accordingly early in December to Messrs. Ghose and Kar, the attorneys, to consult them as to getting a divorce. At this interview the wife proposed that her husband should go to a house of ill-fame, and that she should have him watched, so that the evidence she considered necessary for a divorce might be obtained. It is common ground that the proposal was made and that the husband refused to accede to the proposition. The wife asserts and the husband denies that it was in consequence of a suggestion of his that she made this proposal.

Later in December the husband became suspicious, and on the 16th of that month at 8-30 or 9 P.M. he followed his wife who went from their house in Garden Reach to 9, Dent's Mission Road. There he discovered that his wife was in the room occupied by Evance. He was afraid to go in ; but retreated to the next house which was occupied by a friend of his, named Jarratt, whence he could see into the room in which his wife was. He followed her again on the following night taking a detective with him again seeing her in the co-respondent's room. He then went home packed up his things and left the house. On the 19th he followed her again, and again saw her in the same room.

The respondent's account is that she went with her husband and a Parsee as far as the gate of No. 9, and that she went into it to see Mrs. Barnes. She says she went three or four times altogether, and she did go into Evance's room. The hall was being white-washed, and she and Mrs. Barnes and Mr. Cleaver

and Mr. Outhwaite who resided in the house were all there, as well as Mr. Evanee. She denies that she ever was alone with Evanee or was guilty of misconduct with him.

After her husband left the house in Garden Reach the respondent had an interview with him at the Docks, at which he told her he had put the matter in his solicitor's hands.

The petition was filed on January 7th and then follows a correspondence between the petitioner and respondent, which forms a very singular feature in the case. It begins with a letter from Mrs. Bowen, dated 19th January, which contains the phrase: "I hope whatever you have against me is nothing but the truth, and not by what you have heard. What you might gain now by lies, you will be punished for hereafter."

Then follows another letter from her, dated the 26th January, asking for an interview about the child, which is answered by the husband on the 27th suggesting she should call and bring the boy with her.

Next comes a very remarkable letter dated the 31st January from Mrs. Bowen. She begins by saying that she has not sent the letter she promised, because she hears Evanee is not going to defend. She expresses a wish to see Mr. Bowen, but fears being watched by Evanee. Then she says "don't be afraid of me. I won't play you a double game if you will only keep your word," and the letter ends with a paragraph. "I will give you something else which will settle the swine properly should he defend. I don't think he will as he has not a brass farthing. Ta Ta for the present. Yours, Winnie."

Then there is an undated letter from Mrs. Bowen stating that she is trying to get the co-respondent's solicitors not to defend the suit.

When questioned about these letters and about the promise referred to, Mrs. Bowen says that, in consideration of being allowed the custody of the child and being paid a sum of Rs. 5,000 by her husband, she agreed to write a letter to her husband admitting her guilt and the "something to settle the swine" was an incriminatory letter which she would write, and "put a back date on it" (to use her own expression), and

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arrange for it to fall into her husband's hands to be used against Evaneo.

She says that suspecting her husband's *bond fides* she got her sister to ask him to deposit the money with her until the case should be over. When he refused to make this deposit, she knew he would not keep his promise and the agreement went off.

Mr. Bowen when cross-examined on these letters gives a very halting explanation about the promise being to keep the case out of the papers.

Nothing transpired after January 31st until the 9th of February when Mrs. Bowen filed her answer.

The case has been fought with vigour by the petitioner and with great bitterness by the respondent.

The first question is, has the adultery been proved ?

[His Lordship then dealt with the evidence, and came to the conclusion that the respondent had committed adultery with the co-respondent.]

The next question is, do the facts disclosed at the hearing establish a case of connivance or collusion so as to debar the petitioner from the relief he claims ?

The circumstance that the wife's adultery took place so shortly after her proposal in the attorney's office might raise a suspicion of connivance, but I do not think there was connivance, because if there was, there was no reason why the respondent should not have asserted it. The admission about the letter she was prepared to write makes it impossible to believe she could have been deterred by any regard for her own character.

On the question of collusion I have no doubt there was an agreement made sometime after January 19th, by which, in consideration of a pecuniary payment, the respondent was prepared not only not to defend the suit, but to furnish the petitioner with evidence, which she believed would be conclusive against herself and against the co-respondent.

But this agreement fell through, probably because the petitioner did not pay.

Had the agreement been acted on, it would have clearly constituted a case of collusion.

But the agreement not acted on, though extremely disgraceful to the petitioner and to the respondent, does not constitute collusion, because it in no way affects the decision of the Court. If parties agree that a matrimonial offence shall be committed, or if they conspire to bring about a state of circumstances from which the Court would infer that a matrimonial offence had been committed, such conduct would be a fraud on the Court and would constitute collusion, or if the parties conspire to lay a false case before the Court or to conceal from the Court facts material for the decision of the case, this would be collusion as it would affect the decision of the case. Further, as is pointed out in *Churchward v. Churchward* (1), there may be a case of collusion where there is an agreement not to defend and where the parties are acting in complete concert in the prosecution of the suit, and the Court is thus deprived of the security for eliciting the whole truth afforded by a contest of opposing interests and is rendered unable to pronounce a decree for dissolution of marriage, with sufficient confidence in its justice. In all these cases the petitioner is disentitled to relief, because he has done something to affect the decision of the case. There has been either *suppressio veri* or *suggestio falsi*, or at the lowest a concert between the parties to bring about a divorce which raises a suspicion that any facts likely to defeat the object of the agreement will not be placed before the Court.

But when parties enter into an agreement to effect a fraud on the Court, and then before anything is done to carry out the agreement, they change their minds, and whether from good or bad motive decline to carry out the fraud they had contemplated, then I do not think their rights are affected. In the present case the agreement in no way affects the decision of the Court, because it was not carried out. The case has been defended and defended with great vigour. No admissions of

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any sort have been made, and there is no reason to suppose from the attitude of the parties that the Court has been deprived of any safeguard.

I hold, therefore, that the petitioner is not disentitled to relief in consequence of the arrangement which he and the respondent were at one time prepared to carry out.

There is no evidence at all in support of the recriminatory charges. The respondent has charged her husband with adultery

The evidence of adultery against the husband consists solely of confessions of misconduct which he is alleged to have made to the wife. Even if the wife could be believed as to this, the confessions would not under the canon law have been sufficient, but the husband contradicts her and, for reasons I have stated, I do not consider her a person whose word is to be relied on.

In the result I hold that the wife has committed adultery, that no act has been done by agreement between the parties which has affected the inception, prosecution or decision of the suit; and the recriminatory charges have wholly failed.

There must be a decree nisi with costs against the co-respondent. I make no order with respect to the wife's costs.

J. C

Attorneys for the petitioner : *Pugh & Co.*

Attorneys for the respondent : *Morgan & Co.*

ORIGINAL CIVIL.

Before Mr. Justice Fletcher

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July 6.

Libel—Plea of Justification—Proceedings in Parliament—Privilege—Fair Comment—Mis-statement of Facts—Harvard's Parliamentary Report—Imputation of Criminal Offence—Damages, assessment of—Deportation under Regulation III of 1818.

In an action for libel, if the defendant withdraws the plea of justification, the statements of facts so far as they relate to the plaintiff are presumed in law to be untrue.

A fair and accurate report of the proceedings in Parliament is privileged even though defamatory. But this privilege is limited to the report of the proceedings.

Wason v. Walter (1) referred to.

If the defendant makes a mis-statement of any of the facts upon which he comments, it at once negatives the possibility of the comment being fair. In order to give room for the plea of fair comment, the facts must be truly stated. Such a plea does not extend to cover mis-statements of fact, however *bona fide*.

Davis & Sons v. Shepstone (2), *Popham v. Pickburn* (3), *Peter Walker & Son, Ltd. v. Hodgson* (4), *Digby v. The Financial News, Ltd.* (5), *Hunt v. The Star Newspaper Company, Ltd.* (6), and *Thomas v. Bradbury, Agnew & Co., Ltd.* (7) referred to.

Imputing to a person the commission of a criminal offence does not fall within the range of fair comment.

Barrow v. Hem Chunder Lahiri (8) followed.

In assessing the damages in an action for libel, the whole conduct of the defendants from the time of the libel down to the time of the judgment should be looked at.

Fraed v. Graham (9) referred to.

In an action for libel, the fact that the plaintiff was deported under the provisions of Regulation III of 1818 should not be taken into consideration as a ground for mitigation of damages.

* Original Civil Suit No. 336 of 1908.

(1) (1868) L. R. 4 Q. B. 73.

(5) [1907] 1 K. B. 502.

(2) (1886) 11 App. Cas. 187.

(6) [1908] 2 K. B. 309.

(3) (1862) 7 H. & N. 891.

(7) [1906] 2 K. B. 627.

(4) [1909] 1 K. B. 239.

(8) (1908) 1 L. R. 35 Calc. 495.

(9) (1889) 24 Q. B. D. 53.

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ORIGINAL SUIT

The facts of this case are as follows: The plaintiff was a British subject residing at Lahore in the Punjab. On the 9th May 1907, he was deported to Mandalay, in Burma, under Regulation III of 1818 (extended to the Punjab by Act IV of 1872). He was released on the 17th November 1907. The article complained of appeared in the "*Englishman*," a daily newspaper published in Calcutta, on the 10th September 1907.

[The article in question is fully set out in his Lordship's judgment.]

In February 1908, the plaintiff demanded an apology and compensation from the defendants. As no reply was given, the plaintiff instituted this suit in April 1908 against the defendant company, and the editors, the printer and publisher.

The defendants admitted publication, and the important paragraph in their written statement was as follows:—

"5. These defendants deny that they printed and published the said words maliciously or with intent to injure the plaintiff, and they state that, in so far as the said words consist of allegations of fact, they are true in substance and in fact, and were published in the belief that they were true, and in so far as they consist of expressions of opinion, they are a fair comment made in good faith without malice and on a matter of public interest and importance."

Mr. A. Chaudhuri, Mr. B. Chakravarti, Mr. S. R. Das, Mr. B. C. Mitter, Mr. S. M. Bose and Mr. B. K. Lahiri, for the plaintiff.

Mr. Eardley Norton and Mr. J. E. Bagram, for the defendants.

[*Mr. Chaudhuri having opened the case for the plaintiff, Mr. Eardley Norton stated that he withdrew the plea of justification and asked for information as to which particular portions of the article the plaintiff complained of as being defamatory. The Court was of opinion that the article should be read as a whole.*

Mr. Eardley Norton then asked for leave to amend the written statement by adding the words "and that they were published on a privileged occasion," to para. 5. This was disallowed.]

Mr. Chaudhuri. The plea of justification having been withdrawn, the suit becomes an undefended one. There can be no plea of fair comment on facts which are not founded on truth: *Barrow v. Hem Chunder Lahiri* (1), *Davis & Sons v. Shepstone* (2). The article imputes to the plaintiff an offence which is punishable under the Indian Penal Code, section 131, with transportation for life. As to the limits of fair comment, see the latest case, *Peter Walker & Son, Ltd. v. Hodgson* (3).

Mr. Eardley Norton. We say that it is fair comment on a public matter referred to in Parliament by Mr. Morley, a person in responsible position.

[The plaintiff was then examined on his own behalf, but the defendants did not call any witnesses.]

Mr. B. Chakravarti then summed up on behalf of the plaintiff.

Mr. Eardley Norton. The article may be divided into two parts: the first portion contained statements of facts, and the last portion contained comments, and I say fair comments, on what was stated in Parliament and inferences drawn from it. With regard to the first portion they are statements not defamatory on the plaintiff, and that if the latter portion can be excused as privileged or as being merely a fair comment, the truth or otherwise of the first portion does not alter the position: *Toogood v. Spyring* (4), *Hunt v. Star Newspaper Co., Ltd.* (5), *Dakhyl v. Labouchere* (6).

Mr. Bagram (following *Mr. Norton*). 'Comment' and 'privilege' are akin to each other. Whether it is a comment, or is covered by a privilege or is 'excusable' amounts to the same thing. There is very little difference between privilege and fair comment. The head note in *Merivale v. Carson* (7) to the effect that *Henuwood v. Harrison* (8) was dissented from is incorrect: see *Thomas v. Bradbury, Agnew & Co., Ltd.* (9).

(1) (1908) I. L. R. 35 Cal. 495.

(2) (1886) 11 App. Cas. 187

(3) [1909] 1 K. B. 239.

(4) (1834) 1 C. M. & R. 181.

(5) [1903] 2 K. B. 309.

(6) [1903] 2 K. B. 325.

(7) (1887) 20 Q. B. D. 275.

(8) (1872) L. R. 7 C. P. 604.

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Here is a State prisoner going to be released. His release is a matter of public importance and I, as a citizen, am interested in such a matter and am privileged to state my opinion on this matter and to advocate a contrary policy. If my comments are relevant, I am protected even if the allegations, on which my comments are based, are incorrect. In such a case the only question would be whether there was actual malice on my part: *Davis v. Shepstone* (1), *McCrivale v. Carson* (2), *Hunter v. Sharp* (3), *Henwood v. Harrison* (4), *Thomas v. Bradbury, Agnew & Co., Ltd.* (5).

[FLETCHER J. I have already ruled that you cannot go into the question of privilege.]

Then I have nothing more to add.

Cur. adv. vult.

FLETCHER J. This is a suit by the plaintiff to recover against the defendants (who are the proprietors, the editors and the printer and publisher of a daily newspaper called "the *Englishman*," published in Calcutta) damages for an alleged libel on the plaintiff published in "the *Englishman*" on the 10th of September 1907.

The plaintiff is a pleader practising in the Chief Court of the Punjab, at Lahore, where he appears to enjoy a considerable professional reputation. The plaintiff has also identified himself with various religious and charitable movements. In politics also the plaintiff has taken an active part, and for some years he was one of the foremost members of the Indian National Congress.

The plaintiff's position in the Punjab may be, from the evidence, described as that of a man of considerable importance and influence.

In the next place, it will be convenient to give a brief account as appearing from the evidence of the material facts preceding the publication of the alleged libel. In the year 1907, there was pending before the Punjab Legislative Council a Bill

(1) (1886) 11 A. C. 187, 190. (3) (1866) 4 F. & F. 682; 15 L. T. 421.

(2) (1887) 20 Q. B. D. 273. (4) (1872) L. R. 7 C. P. 604.

(5) [1906] 2 K. B. 627.

called the Canal Colonisation Bill. The provisions of this Bill had, rightly or wrongly, given rise to very considerable resentment amongst certain classes of the people of the Punjab. It was said on behalf of the opponents of the Bill that the Bill proposed to alter the provisions of the agreements which had been entered into by the Government, and that such alterations were detrimental to the interest of the colonists. Amongst the colonists were some or perhaps a considerable number of military pensioners, and it is also in evidence that a large proportion of the sepoy in the Punjab are drawn from persons engaged on the land.

An agitation against the Bill was set on foot and the plaintiff interested himself in the opposition to the Bill. There was at this time in the Punjab one Ajit Singh, who was also taking a leading part in the opposition to the Bill. He has been described in certain articles in "*the Englishman*" as the "lieutenant" of the plaintiff.

The plaintiff has denied on oath that he was in any way associated with Ajit Singh and his statement being uncontradicted must, at any rate for the purpose of this case, be accepted. The plaintiff, however, admits being acquainted with Ajit, whom he knew through his brother Kissen Singh, and the manner in which he made Ajit's acquaintance was by reason of Kissen being the manager of an orphanage with which the plaintiff was identified.

There was at Lahore an Association of Zemindars and the plaintiff, in March 1907, was approached by a Mahomedan gentleman, who was the Secretary of this Association with a view to the plaintiff attending a meeting proposed to be held at Lyallpur on the 27th of March 1907 to protest against the Bill. The plaintiff was at first unwilling to accede to the request that he should attend this meeting, as he had recently suffered a severe domestic bereavement by the death of his son-in-law and also on the ground that his own health was not good. The Secretary, however, prevailed upon the plaintiff to agree to attend the meeting, and accordingly a meeting of the Association was summoned to appoint a deputation to be present

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at the meeting. Whether the plaintiff formed one of the deputation or whether the deputation was appointed to accompany the plaintiff to the meeting, the plaintiff is unable to recollect.

On the 27th of March the plaintiff and the members of the deputation proceeded to Lyallpur to attend the meeting. On their arrival at the place of meeting at about 11 o'clock, they found Ajit Singh addressing a large crowd. The plaintiff says one of the members of the deputation made a protest to Ajit Singh as to his addressing the meeting before it had been properly opened. The meeting was then opened. The plaintiff says he was not an office-bearer at the meeting and therefore had no right to determine who should address the meeting. The plaintiff addressed the meeting twice and had a hand in settling the address which was forwarded from the meeting to His Excellency the Viceroy protesting against the provisions of the Bill. Ajit Singh also addressed the meeting. The plaintiff says Ajit used "strong words" both against the Bill and the Government, but he does not think he was guilty of uttering seditious language. The plaintiff says he is not aware that any soldiers were present at the meeting, but admits that military pensioners were present. The plaintiff's evidence is that this was the only meeting upon which he appeared on the same platform as Ajit Singh. As to the meetings at Rawalpindi and Ferozepur, which have been referred to during the progress of this case and were also referred to in the proceedings in Parliament, the plaintiff says as to the meeting at Rawalpindi he knew nothing about that meeting until some time after it had been held, and as to the meeting at Ferozepur the plaintiff says he does not know even now whether this meeting was ever in fact held.

On the 9th of May 1907, the Governor-General in Council, acting under the provisions of Regulation III of 1818 (as extended to the Punjab by Act IV of 1872), deported the plaintiff and Ajit Singh and confined the plaintiff in the Mandalay Jail.

There can be little doubt that at the time of the deportation of the plaintiff, there was considerable political unrest in the Punjab.

In passing, I may state that the Canal Colonisation Bill, after passing through the Punjab Legislative Council, was vetoed by the Governor-General in Council.

Almost immediately following the deportation of the plaintiff, questions were put in the House of Commons with reference thereto. The answers of the Secretary of State to such questions and his speech to the House on the occasion of the debate on the Indian Budget have formed the sole evidence which the defendants have relied upon in this suit.

Sometime prior to the 10th of September 1907, but on what exact date I have not been informed, the Secretary of State made a statement in Parliament which has been called "a half-promise for the release of Lajpat Rai." In the issue of "the *Englishman*" of the 10th of September 1907 appeared the libel complained of.

The alleged libel forms a portion of an article, numbered X, which is one of a series of articles purporting to come from a correspondent "in the Punjab Hills" and is in the following terms :—

"It is about time now that the true facts as to the deportation of Lajpat Rai were given out. Last year the native officers of several of the native regiments in the Punjab confidentially reported to their commanding officers that persistent efforts were being made to tamper with the loyalty of the sepoys. In due course, the commanding officers reported this to the higher military authorities. At the beginning of this year, the native officers of almost every native regiment reported to their commanding officers that the provisions of the Canal Colonies Bill were being used most effectively by the agitators to inflame the sepoys against the Government, and in this connection the names of Lajpat Rai and Ajit Singh were given as the principal agitators. It must be remembered that the Canal Colonists are mostly old soldiers, therefore in close touch with the sepoys. The native officers further urged that unless the provisions of the Canal Colonies Legislation were vetoed, they could not answer for the loyalty of the native Army in the Punjab. The commanding officers confidentially told Lord

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Kitchener that unless the Canal Colony Legislation was vetoed, and Lala Lajpat Rai and Ajit Singh arrested, they could not answer for the loyalty of the native Army in the Punjab. Lord Kitchener lost no time in seeing Lord Minto, and the latter at once telegraphed to the Civil authorities in the Punjab for corroboration of these alarmist reports. The Civil authorities at Lahore were already in a panic as to the occurrences at Lyallpur, and promptly confirmed all Lord Kitchener's statements, but they demurred to the vetoing of the Canal Colonies Legislation, and said the deportation of Lajpat Rai and Ajit Singh would be sufficient. Lord Minto was inclined to side with the Civil authorities in the Punjab, but Lord Kitchener put his foot down and said that if the Canal Colony Legislation was not vetoed and Lajpat Rai and Ajit Singh deported, he would resign as a protest. As neither Lord Minto nor Mr. Morley dared allow Lord Kitchener to resign, the Canal Colony Legislation was promptly vetoed, and Lajpat Rai and Ajit Singh deported. I assert the truth of these statement in spite of any official denials. A long residence in India has taught me that between an official denial and a terminological inexactitude there is a distinction without any real difference. Any way these statements explain the silence of Mr. Morley about Lajpat Rai under the daily heckling he has endured in Parliament for months past. My only reason for now publishing these statements is the half-promise given by Mr. Morley in Parliament for the release of Lajpat Rai. That Lajpat Rai has been guilty of tampering with the loyalty of the Punjab sepoy there can be no possibility of doubt, and, therefore, his release for years to come would only be a dangerous act of criminal folly. The very virtues of Lajpat Rai only make him more dangerous, and it is the half-religious, half-political fanatics of this half-sane, half-mad brand that are always the most dangerous conspirators."

On the 17th November 1907, the plaintiff was released by order of the Governor-General in Council, and on the 6th of February 1908, the attorneys for the plaintiff wrote to the defendants demanding an apology for the statements mentioned

above and compensation for the injury done to the plaintiff. To this letter none of the defendants sent any reply. Accordingly on the 24th of April 1908, the plaintiff instituted the present suit, claiming Rs. 50,000 as damages. The defendants filed their written statements on the 6th of June. By such written statements the defendants pleaded (a) that the statement complained of, in so far as it consists of allegations of fact, was true in substance and in fact, and was published in the belief that such statements were true, and (b) in so far as the statement consists of expressions of opinion, the same was a fair comment made in good faith without malice, on a matter of public interest and importance. Almost immediately after the leading counsel for the plaintiff had opened his case, Mr. Norton, the leading counsel for the defendants, stated that he did not intend to proceed with the plea of justification, but applied for leave to amend the written statements by setting up a plea of privilege.

This application I refused on the following grounds :—*First*, that it would be manifestly unfair to the plaintiff to allow the defendants after the trial has commenced to raise a new defence, of which the plaintiff had no notice; *secondly*, it was not shown in what manner the defendants could claim privilege or that they had any greater right to comment on the actions of the plaintiff than any other of His Majesty's subjects; and, *thirdly*, that I noticed that the written statement, which was filed as long ago as the 6th of June 1908, was settled by Mr. Norton in conference, and I considered that the proposed plea of privilege was purely an after-thought which it was desired to raise when it was found by the defendants that the plea of justification would have to be abandoned.

Now the case for the defendants has been put by counsel in the following way :—*First*, Mr. Norton has admitted that the article from its commencement down to and including the sentence "as neither Lord Minto nor Mr. Morley dared allow Lord Kitchener to resign, the Canal Colony Legislation was promptly vetoed and Lajpat Rai and Ajit Singh deported," are statements of fact. But, Mr. Norton says, notwithstanding

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the fact that he is not proceeding with his plea of justification, and therefore these facts, so far as they relate to the plaintiff, are presumed in law to be untrue, yet as the defendants drew their facts from a public document they are to be held excused and not liable for the untrue facts stated in the article. The public document relied on is Hansard's Report of Parliamentary Debates published under the authority of the House of Commons. The argument on this branch of the case may shortly be summarised as follows: 'True, we, the defendants now admit that the statements of facts in our article are untrue, but we were misled by the statements made by the Secretary of State in Parliament and published in "Hansard" from which source we drew our untrue statements and therefore we ought to be excused.' The second branch of Mr. Norton's argument is on the remainder of the article. This portion of the article, he says, consists solely of comment, and, further, that the comment is fair and *bonâ fide* on the facts set out in the previous portion of the article.

I will now deal with the two branches of Mr. Norton's argument.

On the first branch of the case, it will be convenient to state the law as to privilege as to statements made in Parliament. The statements made by members in the House are absolutely privileged, and this privilege would, of course, apply to the statements and speeches made by the Secretary of State and other members in the House of Commons with reference to the deportation of the plaintiff. Further, since the decision of *Wason v. Waller* (1), it has not been doubted that a fair and accurate report of the proceedings is privileged, even though defamatory, but this privilege is limited to the report of the proceedings. It would be a very wide extension of this privilege to hold it to cover any independent statement of facts drawn from Hansard or any other report of the proceedings in Parliament. The proposition is an alarming one—take, for instance, the case of any member of the House carried away by party feeling, making a statement imputing dishonourable

or discreditable conduct to a particular individual. Is it, forsooth, to be said that every member of the public by reason of the fact that the statement was made in Parliament and subsequently published in "Hansard," is entitled to impute to that individual, that he has been, in fact, guilty of the dishonourable conduct that was imputed to him by some Member in Parliament? And in the event of the person so defamed coming to Court for redress, is he to be met with a plea that the statement was made in Parliament and subsequently published in "Hansard" and, therefore, notwithstanding that the defendant admits that the statement is untrue, that the plaintiff is to be deprived of his remedy and ruled out of Court solely on the ground that the statement is drawn from "Hansard"? I have not been able to find any statement of the law that would in any way warrant such a proposition and I am convinced that such is not the law. And yet this is the sole defence to the first part of the article. It would be sufficient for me, therefore, to hold that the plea raised by the defendants as to the first portion of the article complained of is bad in law. Having regard, however, to the course this trial has taken, I propose to examine briefly whether the statements in the first portion of the article could, in fact, have been drawn from the statements made in Parliament as reported in "Hansard." Now, the defendants are met *in limine* with this difficulty—the writer opens with a statement: "It is about time now that the true facts as to the deportation of Lajpat Rai were given out." That statement is only susceptible of one meaning, namely, that the facts as heretofore given out were not the "true" facts, and that the writer intended to divulge from some source or other the facts that he says are true. It is agreed that the only facts that had been "given out" at that date, were the statements made in Parliament which the writer implies are not the "true" facts. The defendants are, therefore, in this difficulty—the writer says the facts given out in Parliament are not the true facts, and that he is about to give to the public the true facts; notwithstanding this statement the counsel for the defendants has argued

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that the writer drew his facts which he says are "true" from the facts which the writer implies are not true. This, of itself, would be a serious difficulty against assenting to the argument that the statements in the article were drawn from the reports in "Hansard." As considerable stress, however, has been placed on this point by the counsel for the defendants, I will examine briefly the statements in the article and compare them with the reports in "Hansard."

Now, in the first place, did the Secretary of State give out in Parliament in detail the circumstances under which the Government of India thought fit to deport the plaintiff? Look at the report in "Hansard" of the proceedings in the House of the 18th of June, and read the answer to a question by Mr. O'Grady "I have already said," answers the right honourable gentleman, "almost too often, in answer to my honourable friend and to one or two honourable gentlemen below the gangway on this side, that it is entirely adverse to public interest to go into detail as to the circumstances which the Government of India, with my full assent, thought justified in the application of this law—the law of the land." And yet in the face of this statement it has been argued that the writer drew these minute details of the circumstances relating to the deportation from the statements of the Secretary of State as reported in "Hansard." But, says the counsel for the defendants, even if they cannot show that the writer drew all his facts as to the circumstances relating to the deportation of the plaintiff from the reports in "Hansard," yet he can show that the writer drew from that source the fact that the plaintiff inflamed the sepoys against the Government, which, he says, is the only statement defamatory on the plaintiff. But the passage relied upon by counsel does not support his argument. That passage is taken from the Secretary of State's speech on the Indian Budget of which the report is as follows:—"In this agitation, it is stated, special attention has been paid to the Sikhs, who, as the House is aware, are among the best soldiers in India, and in the case of Lyallpur to the military pensioners." The Secretary of State obviously carefully guarded himself from giving

this statement out as a fact but only as a report, though, no doubt, a report which he had no reason to question or doubt. This is the only statement in "Hansard" to which counsel has been able to call attention as to the tampering with the loyalty of the Sikhs. The statement in "Hansard" falls far short of a statement that in fact the plaintiff had tampered with the loyalty of the Sikhs.

Now, if the article complained of is looked into, it will be seen that the writer opens with a statement of what happened "last year," i.e., 1906, as to certain confidential reports passing between certain military authorities, and then the writer proceeds to give in close detail of what happened in 1907 as to reports from one military authority to another until the reports reach the Commander-in-Chief. Next comes a most minute description of the action of Lord Kitchener on receiving these reports and of the action of His Excellency the Viceroy after an interview with Lord Kitchener, and the writer professes to be so fully acquainted with these details that not only does he inform the public that His Excellency the Viceroy communicated with the Punjab Civil authorities, but he also gives the purport of the message "for corroboration" and the mode by which it was sent—"telegraphed."

The article then gives the reply of the Punjab Government, which the public are told was sent "promptly" and the state of the mind of the Viceroy after receiving that reply, namely, that the Viceroy "was inclined to side" with the Punjab Government. But this view of the case, says the writer, was not in accordance with Lord Kitchener's views, who "put his foot down" and said that unless the Canal Colony Legislation was "promptly" vetoed and the plaintiff and Ajit Singh deported, "he would resign as a protest." Now, where in "Hansard" is there a single statement as to there being confidential reports between the various military authorities or as to the contents of those, or as to the attitude of the Viceroy or Lord Kitchener? The next statement in the article is one of such an extraordinary nature that I will set it out in full:—"As

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neither Lord Minto nor Mr. Morley dared allow Lord Kitchener to resign, the Canal Colony Legislation was promptly vetoed and Lajpat Rai and Ajit Singh deported." And yet the defendants say that the statements in this article were drawn from the reports in "Hansard." If the writer had before him "Hansard's" reports, as alleged by the defendants, he could not have failed to notice the following statement of the Secretary of State. "Nobody appreciates," says Mr. Morley, "more than I do, the danger, the mischief and the iniquity of what is called 'Reason of State.'" Nevertheless in view of this statement, which the defendants say, was before the writer, he does not hesitate to charge His Majesty's principal Adviser on Indian affairs, with having concurred in an act, which he knew to be 'a danger, a mischief and an iniquity' and only to be resorted to, with a sense of gravest responsibility solely because he "dared not allow Lord Kitchener to resign." A more reckless statement than this it is impossible to imagine, and unsupported, as it is, by a tittle of evidence, it is difficult to say whether it is more libellous on the Viceroy, Mr. Morley or Lord Kitchener.

But, says counsel for the defendants, even if this statement is untrue, it has nothing to do with the present case. With that view I am wholly unable to agree. The statement establishes conclusively that the statements in the article were not drawn from "Hansard," and also the recklessness of the statements made by the writer.

It is only necessary, before parting with the first branch of the case, to call attention to the statement of the writer in which he asserts the truth of his "statements in spite of official denials," and calling attention to the fact that there was little, if any, difference between an "official denial" and a "terminological inexactitude." In face of this statement, counsel for the defendants asked me to hold that the writer was not putting forward the statements in the article as true within his own knowledge but only as being drawn from "Hansard's" reports. I decline to do so, and must judge the writer by the language used.

I accordingly find as a fact that the statements in this article were not drawn from statements of Parliamentary Reports in "Hansard," and, secondly, even if they were, the statements are not a fair and accurate report of proceedings in Parliament so as to give to the defendants the protection they now claim for the same. The defendants having withdrawn the plea of justification, I must take it that the statements in the article are untrue.

I now come to deal with the second branch of the case, namely, that the second portion of the article is a fair comment on a matter of public interest and importance. Before dealing with the facts in this portion of the case, it will be convenient to consider briefly what are the limits of the right of fair comment on matters of public interest and importance. And in this respect, the first authority I would refer to is the judgment of the Privy Council in the case of *Davis v. Shepstone* (1), which was delivered by the late Lord Herschell, where he laid down the law in the following terms:—"There is no doubt that the public acts of a public man may lawfully be made the subject of fair comment or criticism, not only by the press but by all members of the public. But the distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as that disgraceful acts have been committed, or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct."

In *Popham v. Pickburn* (2) Wilde, B., said "It was contended, that this libel might be justified as a matter of public discussion on a subject of public interest. The answer is:—This is not a discussion or comment. It is the statement of a fact. To charge a man incorrectly with a disgraceful act, is very different from commenting on a fact relating to him truly stated."

I will only refer to one other case, as it is the most recent authority on the point. The case is that of *Peter Walker &*

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(1) (1886) 11 App. Cas. 187, 190.

(2) (1862) 7 H. & N. 891, 898.

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Son v. Hodgson (1) which was recently decided by the Court of Appeal in England.

The Court in that case considered the various earlier authorities and Vaughan Williams L.J. in course of his judgment first lays down that the law is now well settled that fair comment is not a branch of privileged occasion and then proceeds to quote with approval the judgment of Lord Collins, then Master of the Rolls, in the case of *Digby v. Financial News* (2), in the following terms: "Comment, in order to be fair, must be based on the facts, and if a defendant cannot show that his comments contain no mis-statements of fact, he cannot prove a defence of fair comment. If the defendant makes a mis-statement of any of the facts upon which he comments, it at once negatives the possibility of the comment being fair. It is, therefore, a necessary part of a plea of fair comment to show that there has been no mis-statement of facts in the statement of the materials upon which the comment was based." And the same learned Lord Justice quotes also with approval a judgment of Lord Justice Fletcher Moulton in *Hunt v. The Star Newspaper Co., Ltd.* (3), where the law was defined in these terms: "In order to give room for the plea of fair comment the facts must be truly stated. If the facts, upon which the comment purports to be made, do not exist, the foundation of the plea fails."

There is only one other statement that I will refer to in the judgment of the Court of Appeal, in *Peter Walker & Son v. Hodgson* (1), because I think it states shortly and in ordinary language the limits of the plea of fair comment. At the top of page 257 of the report, Kennedy L.J. quotes with approval from the judgment of Lord Collins in *Thomas v. Bradbury, Agnew & Co., Ltd.* (4), when Lord Collins makes the following statement of the law, namely, that the plea of fair comment "does not extend to cover mis-statements of fact, however *bonâ fide*."

(1) [1909] 1 K. B. 232.

(2) [1907] 1 K. B. 502, 507.

(3) [1908] 2 K. B. 309, 326

(4) [1908] 2 K. B. 627.

Now, turning to the portion of the article which Mr. Norton says is fair comment. The first statement that Mr. Norton says is a comment is in the following terms: "That Lajpat Rai has been guilty of tampering with the loyalty of the Punjabi sepoy there can be no possibility of doubt." That this statement imputes to the plaintiff the commission of an offence punishable under section 131 of the Indian Penal Code, with transportation for life, is not doubted. Mr. Norton has argued that this statement, though defamatory, is a fair comment and therefore ought to be excused. It appears to me that there are two answers to that argument which may be given very shortly. The first is one drawn from the authorities cited by me above, namely, that, if the facts are mis-stated, it at once negatives the possibility of the comment being fair. The facts, as stated in the article, have already been held by me for the purpose of this case to be untrue; it follows that the comment cannot be fair. The second answer to the argument is one founded on the decision of this Court, in the case of *Barrow v. Lahiri* (1), to which decision I was a party. The Court there decided that imputing to a person the commission of a criminal offence does not fall within the range of fair comment. On both these grounds, I am of opinion that the plea of fair comment fails.

It only remains for me now to assess the damages to be paid by the defendants to the plaintiff. Now, the words used concerning the plaintiff in the present case are of a particularly serious nature and are libellous *per se*. The general damages presumed to be the natural or probable consequences of the words used need not to be proved by evidence. The fact that the libel was published in a newspaper is an important consideration in assessing the damages. As Best C.J. said, in *De Crespigny v. Wellesley* (2), publication in a newspaper may "circulate the calumny through every region of the globe. The effect of this is very different from that of the repetition of oral slander. In the latter case, what has been said is known only to a few persons, and if the statement be untrue, the imputation cast

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(1) (1908) L. L. R. 35 Calc. 495.

(2) (1829) 5 Bing 392, 402, 403.

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upon any one may he get rid of; the report is not heard of beyond the circle in which all the parties are known, and the veracity of the accuser, and the previous character of the accused, will be properly estimated. But if the report is to be spread over the world by means of the press, the malignant falsehoods of the vilest of mankind, which would not receive the least credit where the author is known, would make an impression which it would require much time and trouble to erase, and which it might be difficult, if not impossible, ever completely to remove. . . . Before he gave it general notoriety by circulating it in print, he should have been prepared to prove its truth to the letter; for he had no more right to take away the character of the plaintiff, without being able to prove the truth of the charge that he had made against him, than to take his property without being able to justify the act by which he possessed himself of it. Indeed, if we reflect on the degree of suffering occasioned by loss of character, and compare it with that occasioned by loss of property, the amount of the former injury far exceeds that of the latter."

Moreover, in assessing the damages the whole conduct of the defendants from the time of the libel down to the time of judgment should be looked [per Lord Esher, M.R., in *Praed v. Graham* (1)], and evidence may be given as to antecedent libels on the plaintiff to shew with what mind the words were published.

Now, what has been the conduct of the defendants in the present case? Libels antecedent to the one now complained of have been published in the prior issues of "the *Englishman*." Expression most highly defamatory of the plaintiff were used in these former articles—we find for example that in one of these articles the plaintiff is described as an "arch-conspirator." We have also the fact that a letter demanding an apology was written to the defendants before suit and to this letter they made no reply. Doubtless, this letter demanded compensation to be paid by the defendants. But I cannot see any reason why if they could not prove the statements they

should not have apologised whilst declining to pay the compensation demanded. This refusal or neglect to answer the letter demanding an apology followed by the defendants placing on the record a plea of justification which was not withdrawn until after the trial was commenced, must naturally go to increase the damages. And the fact that no expression of regret for the language has even now been made by the defendants ought also to be taken into consideration. Nor must the conduct of the defendants in publishing this libel without, so far as appears in the evidence, making any enquiry as to what source the writer obtained his alleged facts from be neglected, for it must have been apparent to the defendants that if the statements contained in the article were in fact true the writer must have obtained them through some unauthorised channel. It would have been open to the defendants, if the plaintiff is a well known revolutionary or seditionist, to have called evidence in reduction of damages to prove the plaintiff's general bad character. No such evidence having been produced, I must assume that no such evidence is forthcoming. There remains to be considered what effect, if any, in mitigation of damages the fact that the plaintiff was deported ought to have.

Now, the preamble of Regulation III of 1818 recites that reason of State "occasionally render it necessary to place under personal restraint individuals against whom there may not be sufficient ground to institute any judicial proceeding, or when such proceeding may not be adapted to the nature of the case, or may for other reasons be inadvisable or improper." Therefore under the terms of this Regulation the Governor-General in Council may, for reasons of State, place under personal restraint not only persons against whom there is no sufficient ground for instituting a judicial proceeding but also persons against whom the instituting of judicial proceedings would be improper. That the reasons for the determination are kept secret, both from the person deported and the public, sufficiently appears from the third recital in the preamble:—
 "And whereas the ends of justice require that . . . the person affected thereby (i.e., the determination of the Governor-

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CRIMINAL REVISION.

*Before Sir Laurence H. Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice Casperer.*

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July 15.

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v.

EMPEROR.*

Transfer of Criminal Case—Grounds of Transfer—Opinion arrived at in another but similar case on other evidence—Criminal Procedure Code (Act V of 1898) s. 526.

The doctrine that a reasonable apprehension in the mind of an accused that he will not have a fair trial is a sufficient ground for transfer is sound, but in applying it regard must be had to the circumstances of each case.

The mere fact that in another case, on other evidence, the Judge has come to a particular conclusion is not in itself a sufficient ground for transfer.
Asimaddi v. Gotinda Baidya (1) referred to.

ONE Abhoy Charan Santra was alleged by the prosecution to be a professional forger who used to forgo, or cause to be forged, hand-notes purporting to be executed in his favour by his enemies or the enemies of those who solicited his services for that purpose. His house was searched, and eight completed hand-notes, ostensibly executed by different persons in his favor, and several such documents in an unfinished state, were found. Among them were two notes purporting to be executed by one Khoda Bux for Rs. 50 and by Sital Prosad Ghose for Rs. 725, respectively, and three notes by Prahlad Das and his aunt, Teni Mayi, Jadu Pal and Mahendra Pal and his brother, Hriday, tenants of the petitioner, for various sums. A number of prosecutions was, thereupon, instituted on account of these notes. In the first of these cases Abhoy was committed with one Jogeswar, charged under sections 467 and 474, Indian Penal Code, in respect of the note (Ex. 2) bearing Sital Prosad's signaturo, and with Basanta Kumar Samanta, charged under sections 467, 187 and 474, Indian Penal Code, in respect of the

* Criminal Revision No. 93 of 1909.

(1) (1897) 1 C. W. N. 426.

note (Ex. 5) containing Khoda Bux's signature. The offences were tried separately by Mr. E. E. Forrester, Sessions Judge of Bankura, who convicted the respective accused in two judgments passed on the 12th June 1909, and sentenced them to five years' rigorous imprisonment. In both trials, he admitted in evidence the other band-notes found in Abhoy's house and held them to be forgeries.

In *Emperor v. Jogeswar and Abhoy* he made the following observations :—

"As evidence of guilty knowledge and system I would refer to the cases of Jadu Pal, Prahlad Das and Mahendra Pal. Notes of hand purporting to be executed by these men were found in Abhoy's house (Exs. 7, 8 and 6). They all deny execution, and the surrounding circumstances established go to show that their statements are true. It is shown that they were all simultaneously involved in a dispute with the landlord, Rajani Kanta Dutt, naib-nazir of this Court, and it is proved by letters found both in Abhoy's and Dutt's houses that these men were friends, and were in correspondence with each other about some litigation. I hold that these three documents are all forgeries. I am satisfied that other notes of hand found in Abhoy's house were forgeries to Abhoy's knowledge, and it is, therefore, a fair inference based upon this circumstance and the other evidence in the case, that Abhoy knew that Ex. 2 was a forgery."

In his judgment in *Emperor v. Basanta Kumar Samanta and Abhoy Charan Santra* there was the following passage :—

"Should, however, the charge of forgery fail in the Appellate Court, I may say that I am satisfied upon the evidence produced that the notes of hand found in Abhoy's house, which purport to bear the signatures (i) of Prahlad and his aunt, Teni Mayi, (ii) of Jadu Pal, and (iii) of Mahendra Pal and his brother, Hriday, are forgeries; and, therefore, even if there were no other evidence, it is a just inference from the existence of these forgeries in Abhoy's possession that he knew that Ex. 5 was a forgery."

The petitioner was committed by the Additional District Magistrate of Bankura charged under sections 483 of the Penal Code with abetment of the forgery of a hand-note purporting to be executed by the said Prahlad Das and his aunt, Teni Mayi, in favour of Abhoy, and the case stood for hearing, in the file of Mr. Ferrester, on the 28th June.

A Rule was issued by CASPERSZ and RYVES JJ. on the District Magistrate of Bankura to show cause why the case against the petitioner should not be transferred for trial to the Assistant Sessions Judge on the ground that the Sessions Judge,

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in delivering judgments in two other cases, on the 12th June, had expressed certain opinions unfavourable to the petitioner. The learned Judges further granted permission to the Sessions Judge to make the proposed transfer himself if he thought it expedient. The Rule now came on for hearing.

Babu Atulya Charan Bose, for the petitioner. The Sessions Judge, on the two trials in respect of the hand-notes in the names of Sital Prasad and Khoda Bux, admitted in evidence the other documents found in Abhoy's house, and among them the note which is the subject of the present case. He held them all to be forgeries, and dealt in his two judgments specifically with the present note, and expressed an opinion unfavourable to the petitioner.

JENKINS C.J. AND CASPERSZ J. Without in any way detracting from the doctrine, which we accept as sound, that a reasonable apprehension in the mind of the accused that he will not have a fair trial is a sufficient ground for transfer, we at the same time hold that in applying that doctrine regard must be had to the circumstances of each case. The mere fact that in another case, on other evidence, the Sessions Judge may have come to a particular conclusion is not in itself a sufficient ground for transfer: and that has been decided by a Division Bench of this Court in *Asimaddi v. Govinda Baidya* (1). On the facts of this case we hold that there should not be a transfer. We feel confident that the learned Sessions Judge, in dealing with the case now under consideration, will not allow his mind to be in any way influenced by any evidence that was adduced before him in the previous case or by any opinion which he then formed on that evidence, and that he will deal with the case without any kind of bias by reason of his decision in the former case. We, therefore, on the facts of this case, discharge the Rule.

Rule discharged.

E. H. M.



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Acts X of 1841 and XI of 1850 (Registration of Ships), as modified up to 1st December, 1893, with foot-notes brought down to 1st December, 1901				In Urdu	...	0	2	6 [1a.]
Act XX of 1847 (Copyright), as modified up to 1st May, 1896				In Urdu	...	0	1	3 [1a.]
				In Negri	...	0	1	3 [1a.]

			Ra. A. P.		
Act XVIII of 1850 (Judicial Officers' Protection)	{ In Urdu	...	0	0	6 [1a.]
with foot-notes ...	{ In Nagri	...	0	0	6 [1a.]
Act XXXIV of 1850 (State Prisoners), as modified	{ In Urdu	...	0	0	6 [1a.]
up to 30th April, 1903 ...	{ In Nagri	...	0	0	0 [1a.]
Act XXX of 1852 (Naturalization), as modified up	{ In Urdu	...	0	0	6 [1a.]
to 1st December, 1902 ...	{ In Nagri	...	0	0	6 [1a.]
Act XII of 1855 (Legal Representatives' suits),	{ In Urdu	...	0	0	3 [1a.]
as modified up to 1st November, 1904 ...	{ In Nagri	...	0	0	3 [1a.]
Act XIII of 1855 (Fatal Accident), as modified	{ In Urdu	...	0	0	6 [1a.]
up to 1st December, 1903 ...	{ In Nagri	...	0	0	6 [1a.]
Act XV of 1858 (Hindu Widow's Re-marriage)	{ In Urdu	...	0	0	6 [1a.]
	{ In Nagri	...	0	0	6 [1a.]
Act XX of 1858 (Police Chaukidars), as modified up	{ In Urdu	...	0	2	6 [1a.]
to 1st November, 1903 ...	{ In Nagri	...	0	2	6 [1a.]
Act XXXIV of 1858 [Lunacy (Supreme Courts)],	{ In Urdu	...	0	1	0 [1a.]
as modified up to 30th April, 1903 ...	{ In Nagri	...	0	1	0 [1a.]
Act XXXV of 1858 [Lunacy (District Courts)], as	{ In Urdu	...	0	1	0 [1a.]
modified up to 30th April, 1903 ...	{ In Nagri	...	0	1	0 [1a.]
Act XXXVI of 1858 (Lunatic Asylums), as	...	In Urdu	0	1	0 [1a.]
modified up to 31st May, 1902 ...	...	In Urdu	0	0	3 [1a.]
Act XIII of 1859 (Workman's Breach of Contract),	{ In Urdu	...	0	0	3 [1a.]
as affected by Act XVI of 1874 ...	{ In Nagri	...	0	0	3 [1a.]
Act IX of 1860 [Employers and Workmen (Dis-	{ In Urdu	...	0	0	3 [1a.]
putes)], as modified up to 1st December, 1904	{ In Nagri	...	0	0	3 [1a.]
Act XLV of 1880 (Penal Code), as modified up to	{ In Urdu	...	1	5	0 [5a.]
1st April, 1903 ...	{ In Nagri	...	1	5	0 [5a.]
Act V of 1881 (Police), as modified up to 7th	{ In Urdu	...	0	2	9 [1a.]
March, 1903 ...	{ In Nagri	...	0	2	9 [1a.]
Act XVI of 1861 (Stage-Carriages), as modified up	{ In Urdu	...	0	1	3 [1a.]
to 1st February, 1898 ...	{ In Nagri	...	0	1	3 [1a.]
Act III of 1864 (Foreigners), as modified up to	{ In Urdu	...	0	1	0 [1a.]
1st September, 1906 ...	{ In Nagri	...	0	1	0 [1a.]
Act III of 1865 (Carriers), as modified up to 31st	{ In Urdu	...	0	0	9 [1a.]
May, 1903 ...	{ In Nagri	...	0	0	9 [1a.]
Act III of 1887 (Gambling), as modified up to	...	In Nagri	0	1	3 [1a.]
1st December, 1896 ...	...	In Nagri	0	1	3 [1a.]
Ditto as modified up to 1st January,	...	In Urdu	0	1	0 [1a.]
1906 ...	...	In Urdu	0	1	0 [1a.]
Act V of 1869 (Indian Articles of War), as	Bound	...	3	0	0 [5a.]
modified up to 1st January, 1895. In English,	...	...	...	...	...
Urdu and Nagri ...	Unbound	...	2	8	0 [5a.]
Act VII of 1870 (Court-tees), as modified up to	...	In Urdu	0	8	3 [2a. 6p.]
1st December, 1896 ...	...	In Urdu	0	8	3 [2a. 6p.]
Ditto as modified up to 1st October,	...	In Nagri	0	8	9 [1a.]
1899 ...	...	In Nagri	0	8	9 [1a.]
Act I of 1871 (Cattle-trespass), as modified up	{ In Urdu	...	0	1	9 [1a.]
to 1st December 1903 ...	{ In Nagri	...	0	1	9 [1a.]
Act XXIII of 1871 (Pensions) ...	{ In Urdu	...	0	0	9 [1a.]
	{ In Nagri	...	0	0	9 [1a.]
Act IV of 1872 (Punjab Laws), as modified up to	...	In Urdu	0	2	6 [1a. 6p.]
1st November, 1904 ...	...	In Urdu	0	2	6 [1a. 6p.]
Act IX of 1872 (Contract), as modified up to	{ In Urdu	...	0	9	9 [3a.]
1st September, 1899 ...	{ In Nagri	...	0	9	9 [3a.]

			Rs. A. P.		
Act XV of 1872 (Christian Marriage), as modified up to 1st April, 1801	...	... {In Urdu In Nagri	...	0 4 0	[2a.]
Act V of 1873 (Government Savings Bank), as modified up to 1st April, 1903	...	... {In Urdu In Nagri	...	0 0 0	[1a.]
Act VIII of 1873 and (Northern India Canal and Drainage), as modified up to 15th July, 1899	...	... {In Urdu In Nagri	...	0 3 3	[1a.]
Act X of 1873 (Oaths), as modified up to 1st February, 1903	...	... {In Urdu In Nagri	...	0 1 0	[1a.]
Act XVI of 1873 (Village and Road, Police, United Provinces)	...	... In Urdu	...	0 1 0	[1a.]
Act IX of 1874 (European Vagrancy)	...	In Urdu	...	0 2 0	[1a.]
Act IX of 1875 (Majority), as modified up to 1st May, 1906	...	... {In Urdu In Nagri	...	0 0 3	[1a.]
Act XI of 1878 (Presidency Banks), as modified up to 1st March, 1900	...	... {In Urdu In Nagri	...	0 3 9	[1a. 6p.]
Act XVIII of 1876 (Oudh Laws)	...	In Urdu	...	0 3 3	[1a. 6p.]
Act I of 1877 (Specific Relief), as modified up to 1st February, 1904	...	... {In Urdu In Nagri	...	0 2 0	[1a.]
Act I of 1877 (Specific Relief), as modified up to 1st February, 1904	...	... {In Urdu In Nagri	...	0 4 6	[1a. 6p.]
Act I of 1878 (Opium), as modified up to 1st December, 1880	...	In Nagri	...	0 4 6	[1a. 6p.]
Act VII of 1878 (Forests), as modified up to 1st December, 1903	...	... {In Urdu In Nagri	...	0 1 6	[1a.]
Act XI of 1878 (Arms), as modified up to 1st May, 1904	...	... {In Urdu In Nagri	...	0 4 0	[1a. 6p.]
Act XVII of 1878 (Northern India Ferries), as modified up to 1st June, 1902	...	... {In Urdu In Nagri	...	0 2 0	[1a.]
Act XVIII of 1879 (Legal Practitioners), as modified up to 1st May, 1896	...	... {In Urdu In Nagri	...	0 2 0	[1a.]
Act XV of 1881 (Factories), as modified up to 1st April, 1891	...	... {In Urdu In Nagri	...	0 2 8	[1a.]
Act XVIII of 1881 (Central Provinces Land Revenue), as modified up to 1st November, 1898	...	In Urdu	...	0 1 6	[1a.]
Act IV of 1882 (Transfer of Property), as modified up to 1st March, 1906	...	... {In Urdu In Nagri	...	0 1 6	[1a.]
Act VI of 1882 (Companies), as modified up to 1st August, 1906	...	... {In Urdu In Nagri	...	0 9 0	[1a. 6p.]
Act XIX of 1883 (Land Improvement Loans), as modified up to 1st September, 1906	...	... {In Urdu In Nagri	...	0 6 8	[2a.]
Act IV of 1884 (Explosives), as modified up to 1st May, 1896	...	... {In Urdu In Nagri	...	0 13 0	[3a.]
Act VI of 1884 (Inland Steam-vessels), as modified up to 1st July, 1891	...	... {In Urdu In Nagri	...	0 14 0	[3a.]
Act XII of 1884 (Agriculturists Loans), as modified up to 1st September, 1906	...	In Urdu	...	0 1 0	[1a.]
Act XVIII of 1884 (Punjab Courts), as modified up to 1st December 1899	...	In Nagri	...	0 1 0	[1a.]
Act II of 1885 (Negotiable Instruments Amendment)	...	In Urdu	...	0 1 3	[1a.]
Act VI of 1885 (Inland Steam-vessels), as modified up to 1st July, 1891	...	In Nagri	...	0 1 3	[1a.]
Act XII of 1884 (Agriculturists Loans), as modified up to 1st September, 1906	...	In Urdu	...	0 3 6	[1a. 6p.]
Act XVIII of 1884 (Punjab Courts), as modified up to 1st December 1899	...	In Nagri	...	0 3 6	[1a. 6p.]
Act II of 1885 (Negotiable Instruments Amendment)	...	In Urdu	...	0 0 6	[1a.]
Act VI of 1885 (Inland Steam-vessels), as modified up to 1st July, 1891	...	In Nagri	...	0 0 6	[1a.]
Act XII of 1884 (Agriculturists Loans), as modified up to 1st September, 1906	...	In Urdu	...	0 2 6	[1a.]
Act XVIII of 1884 (Punjab Courts), as modified up to 1st December 1899	...	In Nagri	...	0 0 9	[1a.]
Act II of 1885 (Negotiable Instruments Amendment)	...	In Urdu	...	0 0 3	[1a.]
Act VI of 1885 (Inland Steam-vessels), as modified up to 1st July, 1891	...	In Nagri	...	0 0 3	[1a.]
Act XII of 1884 (Agriculturists Loans), as modified up to 1st September, 1906	...	In Urdu	...	0 0 3	[1a.]
Act XVIII of 1884 (Punjab Courts), as modified up to 1st December 1899	...	In Nagri	...	0 0 3	[1a.]

				Rs. A P.			
Act XIII of 1885 (Telegraphs), as modified up to 1st March, 1905	...	...	In Urdu	...	0	1	0 [1a.]
Act XXI of 1885 (Madras Civil Courts Amendment)	...	...	In Urdu	...	0	0	3 [1a.]
Act II of 1886 (Income-tax), as modified up to 1st April, 1903	...	...	{ In Urdu In Nagri	...	0	3	0 [1a. 9p.]
Act IV of 1886 (Amending Section 265 of Contract Act)	...	...	In Urdu	...	0	0	3 [1a.]
Act VI of 1888 (Births, Deaths and Marriage Registration)	...	...	In Urdu	...	0	1	3 [1a.]
Act X of 1888 (Criminal Law Amendment)	...	...	In Urdu	...	0	0	9 [1a.]
Act XI of 1888 (Tramways), as modified up to 31st December, 1900	...	...	{ In Urdu In Nagri	...	0	3	3 [1a.]
Act XIII of 1888 (Securities), as amended by Repealing and Amending Act, 1891	...	...	{ In Urdu In Nagri	...	0	0	9 [1a.]
Act VI of 1887 (Companies Amendment)	...	...	In Urdu	...	0	0	3 [1a.]
Act VII of 1887 (Suits' Valuation)	...	...	In Urdu	...	0	0	9 [1a.]
Act IX of 1887 (Provincial Small Cause Courts), as modified up to 1st December, 1898	...	...	{ In Urdu In Nagri	...	0	2	3 [1a.]
Act X of 1887 (Native Passenger Ships)	...	...	In Urdu	...	0	1	8 [1a.]
Act XII of 1887 (Bengal, North-West Provinces and Assam Civil Courts)	...	...	{ In Urdu In Nagri	...	0	1	3 [1a.]
Act XIV of 1887 (Indian Marine), as modified up to 15th February, 1890	...	...	{ In Urdu In Nagri	...	0	3	6 [1a.]
Act XV of 1887 (Burma Military Police)	...	...	{ In Urdu In Nagri	...	0	0	9 [1a.]
Act XVIII of 1887 (Allahabad University)	...	...	In Urdu	...	0	1	0 [1a.]
Act III of 1888 (Police), as modified up to 1st March, 1903	...	...	In Urdu	...	0	0	3 [1a.]
Ditto (as passed)	...	...	In Nagri	...	0	0	8 [1a.]
Act IV of 1888 (Indian Reserve Forces), as modified up to 1st March, 1893	...	...	In Urdu	...	0	0	3 [1a.]
Ditto (as passed)	...	...	In Nagri	...	0	0	3 [1a.]
Act V of 1888 (Invention and Designs)	...	...	In Urdu	...	0	2	3 [1a.]
Act VI of 1888 (Debtors)	...	...	{ In Urdu In Nagri	...	0	0	8 [1a.]
Act I of 1809 (Metal Tokens), as modified up to 1st April, 1904	...	...	{ In Urdu In Nagri	...	0	0	8 [1a.]
Act II of 1829 (Measures of Length)	...	...	{ In Urdu In Nagri	...	0	0	3 [1a.]
Act IV of 1829 (Marchandise Marks), as modified up to 1st February, 1904	...	...	{ In Urdu In Nagri	...	0	1	0 [1a.]
Act VI of 1833 (Probate and Administration)	...	...	{ In Urdu In Nagri	...	0	2	0 [1a.]
Act VII of 1829 (Succession Certificate) as modified up to 1st December, 1903	...	...	In Urdu	...	0	0	6 [1a.]
Act VII of 1829 (Succession Certificate) as modified up to 1st December, 1903	...	...	In Urdu	...	0	0	6 [1a.]
Act VII of 1829 (Succession Certificate) as modified up to 1st December, 1903	...	...	In Urdu	...	0	0	6 [1a.]
Act XIII of 1839 (Canionments), as modified up to 1st March, 1895	...	...	In Nagri	...	0	1	9 [1a.]
Act XIII of 1839 (Canionments), as modified up to 1st March, 1895	...	...	In Nagri	...	0	0	3 [1a. 9p.]
Act XV of 1833 (Official Secrets), as modified up to 1st April, 1904	...	...	{ In Urdu In Nagri	...	0	0	9 [1a.]
Act XV of 1833 (Official Secrets), as modified up to 1st April, 1904	...	...	{ In Urdu In Nagri	...	0	0	9 [1a.]

					Rs. A. P.		
Act XVI of 1889 (Central Provinces Land Revenue)	...	...	Land { In Urdu In Nagri	...	0 1 6	[1a.]
Act XX of 1889 (Lunatic Asylums Amendment)	...	...	...	...	0 1 6	[1a.]
Act I of 1890 (Revenue Recovery)	...	...	In Urdu	...	0 0 3	[1a.]
Act II of 1890 (Amending Acts XVII of 1884, X of 1885, II of 1874 and V of 1821)	...	...	In Urdu	...	0 0 3	[1a.]
Act V of 1890 (Indian Forest and Burma Forest Amendment)	...	...	In Urdu	...	0 0 6	[1a.]
Act VI of 1890 (Charitable Endowments), as modified up to 1st August, 1903	...	...	In Urdu	...	0 0 6	[1a.]
Act VIII of 1890 (Guardians and Wards)	...	...	In Urdu	...	0 2 3	[1a. 9p.]
Act IX of 1890 (Railways), as modified up to 1st June, 1905	...	...	In Urdu	...	0 8 0	[2a.]
Act IX of 1890 (Railways), as modified up to 1st May, 1896	...	...	In Nagri	...	0 8 0	[2a.]
Act X of 1890 (Press and Registration of Books Amendment)	...	...	In Urdu	...	0 0 3	[1a.]
Act XI of 1890 (Prevention of Cruelty to Animals)	...	...	In Urdu	...	0 0 6	[1a.]
Act XIX of 1890 (Salt Amendment)	...	...	In Urdu	...	0 0 3	[1a.]
Act XX of 1890 (North-Western Provinces and Oudh)	...	...	In Urdu	...	0 1 0	[1a.]
Act X of 1891 (Indian Criminal Law Amendment)	...	...	In Urdu	...	0 0 3	[1a.]
Act XIV of 1891 (Oudh Courts)	...	...	In Urdu	...	0 0 6	[1a.]
Act XVIII of 1891 (Bankers' Books Evidence), as modified by Acts I of 1893 and XII of 1900	...	...	{ In Urdu In Nagri	...	0 0 3	[1a.]
Act II of 1892 (Christian Marriage Validation)	...	...	In Urdu	...	0 0 3	[1a.]
Act IV of 1892 (Bengal Court of Wards Amendment)	...	...	In Urdu	...	0 0 6	[1a.]
Act VI of 1892 (Limitation Act and Civil Procedure Code Amendment)	...	...	In Urdu	...	0 0 3	[1a.]
Act IV of 1893 (Partition)	...	...	In Urdu	...	0 0 3	[1a.]
Act I of 1894 (Land Acquisition)	...	...	{ In Urdu In Nagri	...	0 2 3	[1a. 6p.]
Act III of 1894 (Criminal Procedure and Penal Codes Amendment)	...	...	In Urdu	...	0 1 6	[1a. 6p.]
Act V of 1894 (Civil Procedure Code Amendment)	...	...	In Urdu	...	0 0 3	[1a.]
Act VIII of 1894 (Tariff), as modified up to 1st October, 1903	...	...	{ In Urdu In Nagri	...	0 0 3	[1a.]
Act IX of 1894 (Prisons)	...	...	{ In Urdu In Nagri	...	0 4 0	[1a.]
Act VII of 1895 (Civil Procedure Code and Punjab Laws Act Amendment)	...	...	{ In Urdu In Nagri	...	0 3 3	[2a.]
Act XII of 1895 (Companies—Memorandum of Association)	...	...	In Urdu	...	0 2 3	[1a.]
Act XIV of 1895 (Pilgrim Ships)	...	...	In Urdu	...	0 0 3	[1a.]

				Rs.	A.	P.
Act XIII of 1885 (Telegraphs), as modified up to 1st March, 1905	...	...	In Urdu	...	0	1 0 [1a.]
Act XXI of 1885 (Madras Civil Courts Amendment)	...	...	In Urdu	...	0	0 3 [1a.]
Act II of 1888 (Income-tax), as modified up to 1st April, 1903	...	...	In Urdu	...	0	3 0 [1a. 9p.]
Act IV of 1888 (Amending Section 265 of Contract Act)	...	...	In Nagri	...	0	3 0 [1a. 9p.]
Act VI of 1888 (Births, Deaths and Marriage Registration)	...	...	In Urdu	...	0	0 3 [1a.]
Act X of 1886 (Criminal Law Amendment)	...	...	In Urdu	...	0	1 3 [1a.]
Act XI of 1886 (Tramways), as modified up to 31st December, 1900	...	...	In Urdu	...	0	0 9 [1a.]
Act XIII of 1886 (Securities), as amended by Repealing and Amending Act, 1891	...	...	In Nagri	...	0	3 3 [1a.]
Act VI of 1887 (Companies Amendment)	...	...	In Urdu	...	0	0 9 [1a.]
Act VII of 1887 (Suits' Valuation)	...	...	In Nagri	...	0	0 0 [1a.]
Act IX of 1887 (Provincial Small Cause Courts), as modified up to 1st December, 1898	...	...	In Urdu	...	0	0 3 [1a.]
Act X of 1887 (Native Passenger Ships)	...	...	In Nagri	...	0	2 6 [1a.]
Act XII of 1887 (Bengal, North-West Provinces and Assam Civil Courts)	...	...	In Urdu	...	0	1 6 [1a.]
Act XIV of 1887 (Indian Marine), as modified up to 15th February, 1899	...	...	In Nagri	...	0	1 3 [1a.]
Act XV of 1887 (Burma Military Police)	...	...	In Urdu	...	0	1 3 [1a.]
Act XVIII of 1887 (Allahabad University)	...	...	In Nagri	...	0	0 9 [1a.]
Act III of 1888 (Police), as modified up to 1st March, 1893	...	...	In Urdu	...	0	0 9 [1a.]
Ditto (as passed)	...	...	In Nagri	...	0	0 3 [1a.]
Act IV of 1888 (Indian Reserve Forces), as modified up to 1st March, 1893	...	...	In Urdu	...	0	0 8 [1a.]
Ditto (as passed)	...	...	In Nagri	...	0	0 3 [1a.]
Act V of 1888 (Invention and Designs)	...	...	In Urdu	...	0	2 3 [1a.]
Act VI of 1888 (Debtors)	...	...	In Urdu	...	0	0 6 [1a.]
Act I of 1889 (Metal Tokens), as modified up to 1st April, 1904	...	...	In Nagri	...	0	0 6 [1a.]
Act II of 1889 (Measures of Length)	...	...	In Urdu	...	0	0 8 [1a.]
Act IV of 1889 (Marchandise Marks), as modified up to 1st February, 1904	...	...	In Nagri	...	0	0 3 [1a.]
Act VI of 1889 (Probate and Administration)	...	...	In Urdu	...	0	0 2 [1a.]
Act VII of 1889 (Succession Certificate) as modified up to 1st December, 1903	...	...	In Nagri	...	0	0 6 [1a.]
Act XIII of 1889 (Cantonments), as modified up to 1st March, 1895	...	...	In Urdu	...	0	1 9 [1a.]
Act XV of 1889 (Official Secrets), as modified up to 1st April, 1904	...	...	In Nagri	...	0	0 3 [1a. 9p.]
	...	...	In Urdu	...	0	0 9 [1a.]
	...	...	In Nagri	...	0	0 9 [1a.]

				Rs. A. P.			
Act XVI of 1889 (Central Provinces Land Revenue)	...	...	{ In Urdu In Nagri	...	0	1	6 [1a.]
Act XX of 1889 (Lunatic Asylums Amendment)	...	...	In Urdu	...	0	0	3 [1a.]
Act I of 1890 (Revenue Recovery)	...	...	In Urdu	...	0	0	3 [1a.]
Act II of 1890 (Amending Acts XVII of 1884, X of 1885, II of 1874 and V of 1831)	...	...	In Urdu	...	0	0	3 [1a.]
Act V of 1890 (Indian Forest and Burma Forest Amendment)	...	...	In Urdu	...	0	0	6 [1a.]
Act VI of 1890 (Charitable Endowments), as modified up to 1st August, 1903	...	...	In Urdu	...	0	0	6 [1a.]
Act VIII of 1890 (Guardians and Wards)	...	...	In Urdu	...	0	2	3 [1a. 9p.]
Act IX of 1890 (Railways), as modified up to 1st June, 1905	...	...	In Urdu	...	0	8	0 [2a.]
Act IX of 1890 (Railways), as modified up to 1st May, 1890	...	...	In Nagri	...	0	8	0 [2a.]
Act X of 1890 (Press and Registration of Books Amendment)	...	...	In Urdu	...	0	0	3 [1a.]
Act XI of 1890 (Prevention of Cruelty to Animals)	...	...	In Urdu	...	0	0	0 [1a.]
Act XIX of 1890 (Salt Amendment)	...	...	In Urdu	...	0	0	3 [1a.]
Act XX of 1890 (North-Western Provinces and Oudh)	...	...	In Urdu	...	0	1	0 [1a.]
Act X of 1891 (Indian Criminal Law Amendment)	...	...	In Urdu	...	0	0	3 [1a.]
Act XIV of 1891 (Oudh Courts)	...	...	In Urdu	...	0	0	0 [1a.]
Act XVII of 1891 (Bankers' Books Evidence), as modified by Acts I of 1893 and XII of 1900	...	...	{ In Urdu In Nagri	...	0	0	3 [1a.]
Act II of 1892 (Christian Marriage Validation)	...	...	In Urdu	...	0	0	3 [1a.]
Act IV of 1892 (Bengal Court of Wards Amendment)	...	...	In Urdu	...	0	0	0 [1a.]
Act VI of 1892 (Limitation Act and Civil Procedure Code Amendment)	...	...	In Urdu	...	0	0	3 [1a.]
Act IV of 1893 (Partition)	...	...	In Urdu	...	0	0	3 [1a.]
Act I of 1894 (Land Acquisition)	...	...	{ In Urdu In Nagri	...	0	2	3 [1a. 6p.]
Act III of 1894 (Criminal Procedure and Penal Codes Amendment)	...	...	In Urdu	...	0	1	0 [1a. 6p.]
Act V of 1894 (Civil Procedure Code Amendment)	...	...	{ In Urdu In Nagri	...	0	0	3 [1a.]
Act VIII of 1894 (Tariff), as modified up to 1st October, 1903	...	...	{ In Urdu In Nagri	...	0	0	3 [1a.]
Act IX of 1894 (Prisons)	...	...	{ In Urdu In Nagri	...	0	4	0 [1a.]
Act VII of 1895 (Civil Procedure Code and Punjab Laws Act Amendment)	...	...	{ In Urdu In Nagri	...	0	3	9 [2a.]
Act XII of 1895 (Companies—Memorandum of Association)	...	...	In Urdu	...	0	2	3 [1a.]
Act XIV of 1895 (Pilgrim Ships)	...	...	In Urdu	...	0	2	3 [1a.]
				...	0	0	3 [1a.]
				...	0	3	0 [1a.]
				...	0	1	3 [1a.]

Rs. A. P.

Act III of 1903 (Electricity)	...	{ In Urdu	...	0	2	6	{ 1a. 6p.
		{ In Nagri	...	0	2	0	{ 1a. 6p.
Act VII of 1903 (Works of Defence)	...	{ In Urdu	...	0	1	3	{ 1a. }
		{ In Nagri	...	0	1	3	{ 1a. }
Act VIII of 1903 (Probate and Administration)	...	{ In Urdu	...	0	0	3	{ 1a. }
		{ In Nagri	...	0	0	3	{ 1a. }
Act IX of 1903 (Tea Cess)	...	{ In Urdu	...	0	0	3	{ 1a. }
		{ In Nagri	...	0	0	3	{ 1a. }
Act X of 1903 (Victoria Memorial)	...	{ In Urdu	...	0	0	3	{ 1a. }
		{ In Nagri	...	0	0	3	{ 1a. }
Act XIII of 1903 (Lepers)	...	{ In Urdu	...	0	0	3	{ 1a. }
		{ In Nagri	...	0	0	3	{ 1a. }
Act XIV of 1903 (Indian Foreign Marriages)	...	{ In Urdu	...	0	0	3	{ 1a. }
		{ In Nagri	...	0	0	3	{ 1a. }
Act XV of 1903 (Extradition), as modified up to 1st December, 1904	...	{ In Urdu	...	0	1	9	{ 1a. }
		{ In Nagri	...	0	1	9	{ 1a. }
Act I of 1904 (Poisons)	...	{ In Urdu	...	0	0	6	{ 1a. }
		{ In Nagri	...	0	0	6	{ 1a. }
Act III of 1904 (Local Authorities Loan)	...	{ In Urdu	...	0	0	3	{ 1a. }
		{ In Nagri	...	0	0	3	{ 1a. }
Act IV of 1904 (North-West Border Military Police)	...	In Urdu	...	0	0	9	{ 1a. }
Act VI of 1904 [Transfer of Property Act (Amendment)]	...	{ In Urdu	...	0	0	3	{ 1a. }
		{ In Nagri	...	0	0	9	{ 1a. }
Act VII of 1904 (Ancient Monuments Preservation)	...	{ In Urdu	...	0	0	9	{ 1a. }
		{ In Nagri	...	0	0	9	{ 1a. }
Act VIII of 1904 (Indian Universities)	...	{ In Urdu	...	0	1	3	{ 1a. }
		{ In Nagri	...	0	1	3	{ 1a. }
Act X of 1904 (Co-operative Credit Societies)	...	{ In Urdu	...	0	1	0	{ 1a. }
		{ In Nagri	...	0	1	0	{ 1a. }
Act XI of 1904 (to revive and continue section 9B of the Indian Tariff Act 1894)	...	{ In Urdu	...	0	0	3	{ 1a. }
		{ In Nagri	...	0	0	3	{ 1a. }
Act XIII of 1904 [Indian Articles of War (Amendment)]	...	{ In Urdu	...	0	0	3	{ 1a. }
		{ In Nagri	...	0	0	3	{ 1a. }
Act XV of 1904 [Indian Stamp (Amendment)]	...	{ In Urdu	...	0	0	3	{ 1a. }
		{ In Nagri	...	0	0	3	{ 1a. }
Act I of 1905 [Local Authorities Loan (Amendment)]	...	{ In Urdu	...	0	0	3	{ 1a. }
		{ In Nagri	...	0	0	3	{ 1a. }
Act II of 1905 [Indian Universities (Validation)]	...	{ In Urdu	...	0	0	3	{ 1a. }
		{ In Nagri	...	0	0	3	{ 1a. }
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		{ In Nagri	...	0	0	0	{ 1a. }
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affording a guide to the amount of compensation to be awarded in the present case. And on appeal by the Government, it was contended that in doing so the High Court had wrongly disregarded the great experience of the Special Judge and had given undue weight as evidence to the decision in the former case, in which it

in estimat
Lordships
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<p>DAMAGES, SUIT FOR—<i>Dogs likely to bite without provocation—Injury by Dogs at a public Recreation-ground—Liability of Owner of Dogs—Scienter.</i> The defendant's dogs which to the knowledge of his servant having the charge of such dogs were likely to bite people without provocation, were taken by such servant to a public recreation-ground. The plaintiff, a child of seven years of age, became frightened at the dogs and cried whereupon the dogs attacked and bit him severely—<i>Held</i>, that the defendant was liable in damages to the plaintiff. <i>Barnes v. Lucile, Ltd.</i>, 23 T. L. R. 389, distinguished</p>	
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<p>DIVORCE—<i>Alimony pendente lite, application for, after decree nisi—Indian Divorce Act (IV of 1869) s. 36.</i> Notwithstanding a decree nisi for dissolution of marriage, on the ground of the wife's adultery, the Court has power, under section 36 of the Indian Divorce Act, to order alimony pendente lite for the period between decree nisi and decree absolute. <i>Dunn v. Dunn</i>, L. R. 13 P. D. 91, considered.</p>	
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HIGH COURT, JURISDICTION OF—Power to revise orders of discharge by Presidency Magistrates, and to direct further inquiry—Criminal Procedure Code (Act V of 1893) ss. 423, 439—Charter Act (24 and 25 Vic., c. 104) s. 15. The High Court has power, under section 439 read with section 423 of the Criminal Procedure Code, to revise an order of discharge passed by a Presidency Magistrate and to direct a further inquiry, if there are good reasons for doing so, although no question of jurisdiction arises in the case. *Hari Dass Sanyal v. Saritulla*, I. L. R. 15 Cal. 603, *Colville v. Kristo Kishore Bose*, I. L. R. 26 Cal. 746, *Dwarka Nath Mondul v. Beni Madhab Banerjee*, I. L. R. 28 Cal. 652, and *Emperor v. Varjivandas*, I. L. R. 27 Bom. 84, followed. *Bellew v. Parker*, 7 C. W. N. 521, referred to. *Charoobala Dabee v. Barendra Nath Mozumdar*, I. L. R. 27 Cal. 126, *Kedar Nath Sanyal v. Khetra Nath Sikdar*, 6 C. L. J. 705, and *Debi Bux Shroff v. Jutmal Dunsjariwal*, I. L. R. 33 Cal. 1282, discussed and dissented from. The High Court cannot interfere, under section 15 of the Charter Act, with the order of a subordinate Court on the ground of an error in law, but only for an error affecting jurisdiction, that is, either a want or refusal of jurisdiction or an illegality in the exercise of it. *Tejram v. Har-sukh*, I. L. R. 1 All. 10, and *Corporation of Calcutta v. Bhupati*

..... matters of vital importance in the case:—Held, that there had
 were prima
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 guished.

MALIK PRATAP SINGH v. KHAN MAHOMED (1909) I. L. R. 30
 Cal. 994

HINDU LAW—Endowment—Creation of Endowment—Proof of Dedi-cation to Idols—Alienation of endowed property—Construction of grant of *Debttar* property—Ancient Document—Evidence Act (I of 1872) s. 90—Power of Mohant to grant lease in perpetuity at fixed rent—Landlord and Tenant—Limitation Act (XV of 1877) Sch. II, Arts. 134, 144—Bond fide Purchaser. The origin of title to the property in suit was a sanad of 1787 granted by the Raja of Pandra to the predecessor in title of the plaintiff, the sebat of a shrine
 of Mohant had
 neal primogeni-
 ed and a mode of
 good character.
 This deed of pottah of *debttar* property is executed to the follow-
 ing effect. I do grant to you by way of *lakheraj debttar* the entire
 mouzah of Gorfalbari in pergunnah Pandra. By bestowing

the donee received the gift as one for the service of the particular
 idols whose sehait he was, and that the income of the mouzah had
 ever since been entirely appropriated for that service. In 1860
 the then Mohant describing himself as "brittibhogi-holder of
debttar," granted to the predecessor in title of the defendants a
mokurari pottah, or permanent lease, of the mouzah in which it was
 described as "my long-standing ancestral *lakheraj debttar* prop-
 erty endowed for the service of the deity." In a suit brought to
 set aside the lease as being beyond the powers of the Mohant and
 therefore void, it was contended by the defendants that though
 the grant was to the Mohant and "by way of *lakheraj debttar*."

there was no complete or specific dedication of the mouzah to the service of any idol, but that the gift was to the Mohant personally and descendible to his heirs:—*Held*, by the Judicial Committee (reversing the decision of the High Court) that, under the circumstances of, and on the evidence in, the case, the mouzah was *debttar* property in the sense of having been dedicated to the worship of the idols represented by the Mohant to whom it had been

proceeds of any . . . be proof that . . . et it was a fact that might well be taken into consideration, when, as in this case, the intention of the founder had to be gathered from an ancient document expressed in ambiguous language. *Muddun Lall v. Komul Bibee*, 8 W. R. 42, followed. There was no allegation of any special circumstances of necessity to justify the grant of the lease which was subject to a fixed rent-charge, payment of which had all along been made to the Mohant.—*Held*, that the power of a Mohant to alienate *debttar* property being, like the power of a Manager for an infant heir, limited to cases of unavoidable necessity [*Prasanna Kumari Dibia v. Golab Chand*, 14 B. L. R. 450; L. R. 2 I. A. 145], a permanent lease at a fixed rent, though adequate at the time, was "a breach of duty in the Mohant," and on the most favourable construction could only enure for the life of the grantor and was not binding on his successors. *Shilensource Debia v. Mothooranath Acharjo*, 13 Moo. I. A. 270, followed. It was also contended that a *mokurari* lease was tantamount to a conveyance in fee simple, and that the lessees must, therefore, be treated as "purchasers" within the meaning of article 134 of Schedule II of the Limitation Act (XV of 1877), and the suit was consequently barred by lapse of time, and the High Court so decided:—*Held* (reversing that decision) that the words "purchased for a valuable consideration" in that article meant that the ownership of the property sold had been absolutely transferred from the vendor to the purchaser in consideration of the price. But a lease in perpetuity left some interest in the lessor, and such a lease, though permanent, was forfeitable: *Kally Dass Ahiri v. Monmohini Dassce*, 1 L. R. 24 Calc. 440. The purchaser must be the purchaser of an absolute title. The defendants were, therefore, not purchasers under article 134, and the suit was not barred.

ABHIRAM GOSWAMI v. SHYAMA CHARAN NANDI (1909) L. L. R. 30 Calc. 1003

HINDU LAW—*Shobaitship*—*Alienation of Shobaitship, inter vivos*. An alienation (*inter vivos*) of the office of *shobait*, by an *argannamah*, to a closely connected member of the family who seems to have more interest in the worship of the idol than any one else, and without any idea of personal gain, is valid under the Hindu law. *Mancharam v. Pranshandar*, 1 L. R. 6 Bom. 294, followed. *Rajeshwar Mullick v. Gopeshwar Mullick*, 1 L. R. 35 Calc. 226, distinguished. *Khetter Chander Ghose v. Hari Das Hind pathya*, 1 L. R. 17 Calc. 237, and *Rajaram v. Ganesh*, 1 L. R. 23 Bom. 121, referred to.

NIRAD MOHINI DASSI v. SHIRADAS PAL DEWARI (1909) L. L. R. 36 Cal. 973

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made in Official Assignee to sell certain immovable properties belonging to an insolvent, but which were subject to a mortgage:— <i>Held</i> , that the Official Assignee was not entitled to charge a commission out of the insolvent's estate on the full value of the properties sold, but only on the amount coming to the insolvent's estate. <i>Held</i> , also, that although the practice of this Court for over thirty years had apparently been to allow such commission, it was contrary to the provisions of the Indian Insolvency Act (11 & 12 Vic., c. 21) and the Supreme Courts' Officers Act, 1848. <i>In re Howard Brothers (Insolvents)</i> , 13 B. L. R. App. 9, commented on.	
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TOLLS—*Dispute concerning the right to collect market tolls and not the possession of the market land*—*Possession under ekarnama as agent of co-sharer for collection of tolls and division of profits*—*Jurisdiction of Magistrate*—*Criminal Procedure Code (Act V of 1898) s. 145*. Section 145 of the Criminal Procedure Code does not apply to a dispute relating to the rights of co-sharers to collect tolls in proportion to their respective shares in a *hat* and not to the possession of the *hat* itself. Where one of two co-sharers was entitled under an *ekarnama* to collect the tolls of the whole market and to divide the profits with the other co-sharer at the end of the year, and the lessee of the latter attempted to collect his lessor's share independently:—*Held*, that the Magistrate had no jurisdiction to take proceedings under section 145 in such a case. A Magistrate cannot under the section determine the method by which the possession of the parties is to be exercised or the agency by which the party in possession is to collect the profits of land. *Nrius Gopal Singh v. Chandi Charan Singh*, 10 C. W. N. 1088, followed. *Sri Mohan Thakur v. Narsing Mohan Thakur*, 1 L. R. 27 Calc. 259, distinguished. *Taruman Bibee v. Asamuddi Bepari*, 4 C. W. N. 426, referred to.

AKALOO CHANDRA DAS v. MONESH LAI (1909) 1 L. R. 30
Calc. 956

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See COMPENSATION 967

PRIVY COUNCIL.

SECRETARY OF STATE FOR INDIA

v.

INDIA GENERAL STEAM NAVIGATION AND RAILWAY
COMPANY. LD.1909
P.C.*
July 1, 20

[On appeal from the High Court at Fort William in Bengal.]

Compensation—Land Acquisition Act (1 of 1894)—Amount of Compensation payable for land on left bank of river Hooghly near Calcutta required for purposes of the Port Commissioners of Calcutta—Judgment in former land acquisition case regarding land in the vicinity, and amount awarded therefor—Review by High Court of valuation by Special Judge.

In this case which related to the amount of compensation payable to the owners of certain land on the left bank of the river Hooghly near Calcutta, which had been acquired by the Government of Bengal under Act I of 1894 for the purposes of the Port Commissioners of Calcutta, the High Court did not agree with the scheme of valuation made by the Special Judge, and had increased his award relying upon the prices paid for a piece of land in the vicinity in previous land-acquisition proceedings as affording a guide to the amount of compensation to be awarded in the present case. And on appeal by the Government, it was contended that in doing so the High Court had wrongly disregarded the great experience of the Special Judge and had given undue weight as evidence to the decision in the former case, in which it was said that the land was so essentially different in area, locality, and special and peculiar advantages, that no deduction could be drawn from the amount awarded for it which would be of any use in estimating the value of the land now in dispute. Their Lordships of the Judicial Committee holding that no good ground for such a contention had been established, dismissed the appeal.

APPEAL from a decree (11th April 1906) of the High Court at Calcutta which varied a decree (11th January 1905) of the Special Land Acquisition Judge of the 24-Pergunnahs, made in Land Acquisition Case No. 200 of 1903.

The party opposing the award of compensation for the acquisition of the land was the appellant to His Majesty in Council.

* Present: LORD MACNAGHTEN LORD DUNEDIN, LORD COLLINS, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

by the Judge. According to the particulars of the Company's claim, a sum, of Rs. 10,70,000 is claimed for the land at the rate of Rs. 1,000 per cottah, Rs. 90,780-10-0 for the buildings on the premises No. 6, Rs. 22,937-12-0 for the buildings on premises No. 7, and Rs. 52,186-7-9 for the buildings on the premises No. 8, Garden Reach Road, Rs. 90,000 for the jetties, pontoons and shear-legs, total Rs. 13,25,910 and the statutory allowance at 15 per cent. on this sum.

"Mr. Garth's objection to the Special Judge's system of valuation are:— (i) that he has over-estimated the area of land necessary to be set apart for roads; and (ii) that he has under-estimated the value of the land, and overlooked the fact that by the opening up of the land by means of roads, the land would practically all become frontage land.

"He relies in support of his claim for the valuation of the land at Rs. 11,000 per cottah on—(1) the fact that the Port Commissioners, when they sold certain land, at the Watganj Pumping Station, which is not very far from the disputed land, to the Calcutta Municipal Corporation, charged them at the rate of Rs. 3,300 per cottah, (2) on an opinion expressed by Mr. Apjohn, the former Engineer and Vice-Chairman of the Port Commissioners, that one-third of the premises Nos. 6, 7 and 8, Garden Reach, was worth 5 lakhs, (3) on two judgments of this Court as to the value of land in the neighbourhood, (4) on certain awards of the Collector for similarly situated lands, (5) on certain conveyances and a lease of lands not far from the lands acquired, (6) on evidence of rents paid for land in the neighbourhood, and (7) on the evidence of certain expert witnesses. On the other hand, the Port Commissioners contend that the land they have now acquired is to the south of the Kidderpore Docks, and therefore of admittedly less value than land to the north of the docks, to which all the awards, conveyances and leases (except one) produced by the claimants relate, and (2) on certain conveyances and leases of land to the south of the docks, i.e., on the same side of the docks as the premises Nos. 6, 7 and 8, Garden Reach Road, and (3) on the evidence of their present Engineer Mr. F. Palmer.

"We must admit that there is much force in Mr. Garth's criticisms of the the Special Judge's system of valuing the land. It is impossible for us to say how much land would require to be left for roads. There is no evidence in this point. Mr. Beachcroft's conjecture that it would be proper to leave nine bighas out of account as required for this purpose may be right or may be wrong, but without the evidence of an Engineer on the subject we can form no definite conclusion on this point. Similarly, there are practically no data on which we can check his division of the land into belts of frontage, firm and low land, or his valuation of the frontage land or of the firm land at Rs. 9 per cottah, the low land at Rs. 3 per cottah, and the dock basin and tank land at half rates. We can only say that comparing the rates allowed by him with the rates mentioned in the conveyance and leases produced by the claimants they appear to be inadequate and below the rates to which, in our opinion, the claimant company is justly entitled.

"We do not attach much importance to the sale of the land for the Watganj Pumping Station by the Port Commissioners to the Calcutta Municipal

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Corporation at the rate of Rs. 3,300 per cottah. The Municipality urgently required a small area of land in that particular locality for a Pumping Station; no other land than the land the Port Commissioners had to sell would meet their requirements; so the Port Commissioners clearly took advantage of the Municipality's exigencies and made them pay a 'fancy' price.

"Nor do we consider that we can regard Mr. Apjohn as having definitely valued a third of the premises 6, 7 and 8, Garden Reach Road, at 5 lakhs of rupees. It appears that Mr. Apjohn and Mr. Ashton of the firm of Messrs. Kilburn and Company had some informal conversation on the subject of this land. Both gentlemen seem to have been endeavouring to ascertain the views of the other. Mr. Apjohn led Mr. Ashton to think, he would recommend to the Port Commissioners to buy one-third of the premises at this figure; but it does not appear certain that Mr. Apjohn, when officially approached on the subject, would have made any such recommendation, or that the Port Commissioners would have accepted such recommendation, if made to them.

"The judgments of the High Court relied on by the claimant are two in number, one dated the 13th August 1903 when the Chief Justice and Mr. Justice Gidit awarded Rs. 950 a cottah for certain frontage, and Rs. 550 a cottah for certain back land situated at the junction of the Watganj and Garden Reach Roads, i.e., for land in a very favourable situation and on the Calcutta side of the docks. The other judgment is one by Harington and Brett JJ., dated the 18th June 1903, awarding Rs. 375 per cottah for land on the south side of the docks. This land faced the Mithapukur Road, which connects the Garden Reach with the Circular Garden Reach Road. The awards were for the premises 11, 12 and 13, Garden Reach Road, which are situated very near the land which is the subject of contention in this case, and with considerable, if not exactly similar, advantages in the way of river frontage. A rate of Rs. 240 per cottah was awarded for No. 12, Garden Reach, and Rs. 495 per cottah for the adjoining premises. There appears to be no satisfactory explanation forthcoming of the difference in these rates.

"The rates specified in the conveyances relied on by the claimant also vary in an extraordinary manner—running from Rs. 1,000 to Rs. 8,000 per cottah. But as the Judge points out, these conveyances are for small pieces of land situated in the populous quarter of Watganj on the Calcutta side of the docks. The lease is at the rate of Rs. 4-8-0 per cottah, but a bonus of Rs. 1,000 was paid which raises the rental to about Rs. 8 per cottah.

"Then, evidence has been given of rents paid in the neighbourhood. The indenture in favour of Messrs. John King and Company, dated the 31st March 1904, shows that certain land on the Calcutta side of the docks was let to this firm at a rental of about Rs. 6 per cottah. The evidence of the witness, Hari Mohan Ghose, shows that he pays rent for land on the south side of the docks at the rate of Rs. 4 per cottah.

"The valuations made by the expert witnesses cited by the claimant also differ very greatly. Mr. Warwick values the road and the river-frontage land at Rs. 1,000 per cottah and the interior land at Rs. 800 per cottah. Mr. Owen values the high land at Rs. 1,000 per cottah and the interior land at Rs. 800 per cottah. Mr. Owen values the high land at Rs. 900 per cottah and the

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overage. We consider we should give this overage rate for the firm land of the premises Nos. 6, 7 and 8, Garden Reach, irrespectively of its situation, *i.e.*, whether front or back, but we think we should give only half this rate for the dock, basin, and tank land. Two of the expert witnesses on the side of the claimant, Mr. Stevens and Mr. Owon, give lower rates for the dock basin, and tank land and the Special Judge proceeds on the same principle.

"As for the buildings, we think, we should allow the claimant the sum of Rs. 1,31,650-2-0 which was the Collector's estimate of their value. The claimant is also entitled to Rs. 500 as allowed by the Collector for the removal of movables, Rs. 3,961-0-0 for the value of the jetties, pontoon and shear-legs, to the valuation of which no exception has been taken during the hearing of this appeal. From the amount must be deducted the capitalized value of the Government revenue at 20 years' purchase. The claimant is, of course, entitled to the statutory allowance of 15 per cent. on the amount of compensation awarded and to costs in proportion in both Courts. We decree the appeal to this extent accordingly. The cross-objections were not pressed."

On this appeal,

Cohen, K.C., DeGruyther, K.C., and A. M. Dunne, for the appellant, contended that the High Court proceeded on an erroneous principle in adopting as the basis of valuation of the land the value put in previous land acquisition proceedings between different parties, in connection with an entirely different plot of land, and irrespectively of and without regard to essential elements of dissimilarity in regard to area, locality, and special and peculiar advantages. The judgment in the previous case relied upon by the High Court was not evidence in the present case of the value of the land in dispute. The land to which that judgment related had, by reason of its position in a highly congested business area at the junction of two main traffic thoroughfares, a special and extraordinary value, and it had nothing in common with the land now in question which could form the basis of comparison between the two in estimating their respective values. In so acting erroneously the High Court had disregarded evidence relating to other land which in respect of proximity and advantages was more similar to the land now in dispute than that covered by the decision relied upon by the High Court. The value of the land in question ought to have been based on the evidence adduced in relation to the value of land on the west and south sides of the docks which as regarded area,

proximity, and general advantages was shown to possess very similar conditions to that now in question. The High Court when valuing the land on the abovementioned basis erred also in awarding to the respondents in addition the value of the existing buildings otherwise than as old materials the value of which had been agreed upon as Rs. 20,000. Finally, the High Court was in error in setting aside the scheme of the Special Judge in ascertaining the value of the land on a rental basis, and had ignored the fact of his special knowledge in connection with such valuation. The date of the declaration of requirement of the land (20th January 1903) was the date to be considered in valuing the land. Reference was made to the Land Acquisition Act (I of 1894), sections 11, 15, 18, 19 and 24: *Secretary of State for Foreign Affairs v. Charlesworth Pilling & Co.* (1) and *Premchand Burrall v. Collector of Calcutta* (2), a case under the former Land Acquisition Act (X of 1870).

Sir Robert Finlay, K.C., Sir Alfred Cripps, K.C., and Kenworthy Brown, for the respondents, contended for the reasons given in the judgment of the High Court that the amount of compensation allowed was not excessive, and that the valuation arrived at by the High Court should be upheld. Reference was made to *Ezra v. Secretary of State for India* (3) and Land Acquisition Act (I of 1894), section 40.

Cohen, K.C., replied.

The judgment of their Lordships was delivered by

LOREN COLLINS. This is an appeal against a decree of the High Court of Judicature at Fort William in Bengal, dated the 11th April, 1906, and made in appeal No. 58 of 1905, which varied the decree of the Special Land Acquisition Judge of the 24-Pergunnahs, dated the 11th January, 1905, and made in Land Acquisition Case No. 200 of 1903.

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(1) (1901) L. L. R. 26 Bom. 1, 16, 17, 24; (2) (1870) L. L. R. 2 Calc. 103.

L. R. 28 I. A. 121, 130, 141.

(3) (1905) L. L. R. 32 Calc. 605;

L. R. 32 I. A. 93.

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The question relates to the amount of compensation payable to the owners of certain land on the left bank of the Hooghly, near Calcutta, which has been acquired by the Government of Bengal under Act I of 1894 for the purposes of the Port Commissioners of Calcutta.

The respondents to this appeal were owners of some portions, and lessees of other portions, of the land in question.

On the 12th June, 1903, an award was made by the Land Acquisition Collector under section 11 of the said Act of 1894, in which he assessed the compensation payable to the parties interested in the said premises at a sum of Rs. 7,57,024-12-9.

The claimants (respondents) filed a petition of objection to the said award and required the matter to be referred by the Collector for the determination of the Civil Court. The matter accordingly came in due course before the Special Judge of the 24-Pergunnahs appointed to hear and determine cases arising out of proceedings under the said Act, who allowed a sum of Rs. 54,594-11-11 in addition to the sum awarded by the Collector.

Against this decision the claimants appealed to the High Court. That Court, in a very careful judgment reviewing the earlier awards and comparing the prices realized on sales of land in the neighbourhood, having regard to the special advantages of, or drawbacks to, their respective situations, and having heard the evidence of experts on both sides, came to the conclusion that the total compensation due to the claimants ought to be increased to the sum of Rs. 10,13,591-8.

It seems to their Lordships that there is no question of principle involved in this appeal. In fact, the main argument of the appellant is a practical denial of the right of the High Court to review the findings of the Special Judge, whose great experience in such cases, they suggested, ought to outweigh all other considerations. Indeed, when one comes to close quarters with their objection to the decision, it seems to resolve itself into no more than this, that the Court gave undue weight to the prices paid on the sale of a particular piece of land in the vicinity as affording a guide to the compensation to be

awarded in the case before them. It is by no means clear to their Lordships that there is any good ground for this suggestion.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be dismissed.

The appellant will pay the costs of the appeal.

Appeal dismissed.

Solicitor for the appellant: *The Solicitor, India Office.*

Solicitors for the respondents: *Morgan Price & Co.*

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APPELLATE CIVIL.

*Before Mr. Justice Stephen and Mr. Justice Vinces**

NIRAD MOHINI DASSI

v.

HIBADAS PAL DEWASIN.*

Hindu Law—Shebaitship—Alienation of Shebaitship, inter vivos.

An alienation (*inter vivos*) of the office of *shebait*, by an *arpannamah*, to a closely connected member of the family who seems to have more interest in the worship of the idol than any one else, and without any idea of personal gain, is valid under the Hindu law

Mancharam v. Pranshankar (1) followed.

Rajeshwar Mullick v. Gopeshwar Mullick (2) distinguished

Khetter Chunder Ghose v. Hari Das Bundopadhyaya (3) and *Rajaram v. Gonesh* (4) referred to.

SECOND APPEAL by Srinati Nirad Mohini Dassi, the defendant No. 2.

The plaintiff, Shibadas Pal Dewasin, sued to establish his title and to recover possession of the land held in *khas* by partition, and of a certain share of the *pala* of the Billeswar *Thakur's sheba*.

* Appeal from Appellate Decree, No. 1520 of 1907, against the decree of Aghore Chandra Hazra, Subordinate Judge of Burdwan, dated April 15, 1907, confirming the decree of Saroda Prasad Banerjee, Munsif of Katwa, dated July 30, 1906.

(1) (1882) L. L. R. 6 Bom. 293.

(2) (1907) L. L. R. 35 Cal. 226.

(3) (1890) L. L. R. 17 Cal. 537.

(4) (1893) L. L. R. 23 Bom. 131

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The facts are as follows :—The plaintiff was the owner of a certain share of the property in dispute and, as reversioner, was entitled to the shares in future upon the death of his co-sharers. The defendants, except the defendant No. 2, were joint *shcchaitis* with the plaintiff in succession to their predecessors in interest. Under a deed of *arpannamah* executed by the defendants Nos. 5, 6 and 7, who were residing at a distant place from the place of worship, in favour of their maternal uncle (the plaintiff), the plaintiff became further entitled to these defendants' shares in the *pala* of the said *Thakur's shccha*. Upon the defendants Nos. 1 and 2 resisting the plaintiff from getting possession of the said shares of the defendants Nos. 5, 6 and 7, the plaintiff brought this suit.

The defendant No. 2 contended, *inter alia*, that *debttar* property and *shccha* were not partible by the Court, and that the *arpannamah* was collusive, fraudulent and illegal.

The Court of first instance decreed the suit in part declaring the plaintiff's title to the *shccha* of the *Thakur*; and on appeal, the learned Subordinate Judge affirmed the judgment of the first Court, holding that the office of *shcchait* was alienable. The defendant No. 2 appealed to the High Court.

Babu Kheller Mohun Sen, for the appellant.

Babu Naliniranjan Chatterjee, for the respondents.

Cur. adv. vult.

STEPHEN AND VINCENT JJ. The plaintiff, respondent in this appeal, sued for certain shares in the *pala* of a *Thakur's shccha*, and in the property appertaining thereto. His claim is based on an *arpannamah* executed in his favour by three of the defendants Nos. 5, 6 and 7. He is at present an eight-anna owner of the property in dispute, has a reversionary interest in $\frac{1}{8}$ th of the remainder, and is the maternal uncle of defendants Nos. 5 to 7. It is asserted in the plaint, and appears to be the case, that the plaintiff owing to his place of residence and other advantages could perform the *shccha* of the *Thakur* much better than defendants 5 to 7, and that this was a reason for the *arpannamah*. Under these circumstances

relying on the decision in *Mancharam v. Pranshankar* (1), the lower Appellate Court has held that the office of *shclait* was alienable by defendants 5 to 7 and that the plaintiff acquired a good title under the *arpannamah*. This decision was, in our opinion, correct. It is true, that the decision in *Mancharam v. Pranshankar* (1) has recently been disapproved of in this Court [see *Rajeshwar Mullick v. Gapeswar Mullick* (2)], but that was on the ground that the alienation was by will. At the same time Maclean C.J. admits that there are authorities for such an alienation *inter vivos* under special circumstances. Such special circumstances seem to have existed in the case of *Khetter Chunder Ghose v. Hari Das Bundopadhyaya* (3) where a transfer *inter vivos* of an idol and the lands with which it was endowed was allowed on the ground that the arrangement was a beneficial one for the idol, because it tended to provide for the proper conduct of its worship. Further light is thrown on the case by the judgment in *Rajaram v. Gonesh* (4), where Ranado J., while affirming the general rule against alienation, indicates private voluntary alienations as possible exceptions to the rule. It is to be observed that in *Mancharam v. Pranshankar* (1), the fact that the alienation was to a person in the line of succession and capable of performing the worship of the idol was regarded as a justification for the alienation, and that in *Rajeshwar Mullick v. Gapeswar Mullick* (2), Mitra J. treated "clear benefit to the *Thakur*" in the same way. In the present case, therefore, as the alienation was by an *arpannamah* to a closely connected member of the family who seems to have more interest in the worship of the idol than any one else, and as it seems to have been made without any idea of personal gain, in order to prevent the interference of the appellant who claims herself as an alien of the interest of defendants 5 to 7, we consider that the case is governed by the special circumstances to which Maclean C.J. refers.

The result is that this appeal is dismissed with costs.

Appeal dismissed.

(1) (1882) I. L. R. 6 Bom. 298.

(3) (1890) I. L. R. 17 Cal. 557.

(2) (1907) I. L. R. 35 Calc. 226.

(4) (1898) I. L. R. 23 Bom. 131.

PRIVY COUNCIL.

P.O.⁴
1903
June 30;
July 9.

MA YWET

v.

MA ME.

[On appeal from the Chief Court of Lower Burma at Rangoon.]

Burmese Law—Adoption—Evidence of adoption—Adult niece claiming to be adopted daughter of childless uncle, and entitled to his estate—Proof of publicity of relationship and notoriety essential—Inferences from past statements and conduct.

According to the law of Burma, by which no formal ceremony is necessary to constitute adoption, the fact of adoption can either be proved as having taken place on a distinct and specified occasion, or may be inferred from a course of conduct which is inconsistent with any other supposition. But in either case publicity must be given to the relationship, and the amount of proof of publicity required will be greater in cases of the latter category when no distinct occasion can be appealed to.

In the case of a child leaving its natural parents and being brought up in the house of another person who treats it as a father would a child, the inference of the relationship existing, and the publicity of the relationship may naturally be drawn from the facts of the lives of the parties, apart from their verbal statements. But in the case of an adult adoption where the inferences to be drawn from "bringing up" are necessarily absent, it is especially requisite to insist on adequate proof.

In this case an orphan adult niece claimed the estate of a childless uncle, with whom it was only natural she should live, on the ground that she had been taken by him as his adopted daughter when she was over 30 years of age, the evidence of the publicity of the relationship alleged depending upon the testimony of the claimant herself, and the statements of the deceased uncle spoken to by witnesses, and the consequence of upholding the adoption being the disinherison of those entitled to succeed.—

Held, that the evidence was not sufficient to establish the adoption.

Where parties might have precluded the raising of subsequent questions by means of an actual, though not ceremonial, adoption in the presence of witnesses, and they had not done so, but had left the fact of adoption to be inferred from past statements and conduct, adequate proof of publicity and notoriety of the relationship should be insisted on.

* Present: LORD MACNAGHTEN, LORD DUNEDIN, LORD COLLINGS, SIR ANDREW SCOBLE and SIR ARTHUR WILSON.

PRIVY COUNCIL.

P.C.*
1903June 30;
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MA YWET

v.

MA ME.

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Held, that the evidence was not sufficient to establish the adoption.

Where parties might have precluded the raising of subsequent questions by means of an actual, though not ceremonial, adoption in the presence of witnesses, and they had not done so, but had left the fact of adoption to be inferred from past statements and conduct, adequate proof of publicity and notoriety of the relationship should be insisted on.

* *Present*: LORD MACNAGHTEN, LORD DENEDIN, LORD COLLINS; SIR ANDREW SCOBLE and SIR ARTHUR WILSON.

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 Me Ywet
 v.
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APPEAL from a judgment and decree (12th March 1907) of the Chief Court of Lower Burma in its appellate jurisdiction, which reversed a judgment and decree (1st May 1906) of the same Court in its original jurisdiction.

The defendant was the appellant to His Majesty in Council.

U Mya, a Burman Buddhist, died at Rangoon on the 19th April 1905, leaving the appellant who claimed to be his adopted daughter, and two sisters, the respondents. The appellant was the daughter of U Nyein who died in 1896, and Ma Ka who died in November 1900. Ma Ka was U Mya's sister, and the appellant's case was that, during Ma Ka's last illness, she asked her brother to take care of the appellant, and that he promised that he would look after her as his daughter; that after Ma Ka's death he did in fact treat her in every way as his daughter; that he gave up his own house in Rangoon and lived with her, up to the time of his death, in her house; and that he informed a number of people that she was his daughter or adopted daughter.

On 25th May 1905, the respondents applied to the Chief Court for Letters of Administration to the estate of U Mya as being his sisters and sole heirs. On 9th June 1905, a caveat was filed on behalf of the appellant, and on 19th June 1905, the Court ordered the matter to be tried as a suit that being the ordinary procedure in such cases.

On 4th July 1905, the appellant applied that Letters of Administration might be granted to her, and on 10th July 1905 the Court ordered the two cases to be tried together. The only issue was—"Is defendant (appellant) the adopted daughter of the deceased?"

The Court (BIGOE J.) held that the adoption was proved and ordered Letters of Administration to be issued to the appellant.

The Appellate Court (IRWIN and HARTNOLL JJ.) reversed the decision of the first Court on the ground that though no particular ceremony was required for adoption among Burman Buddhists, yet some overt act or speech on the part of the person

adopting was necessary, and that the fact of the adoption must be shown to the public and notorious, and that in this case there was no proof of any overt act or of notoriety. The Appellate Court accordingly ordered that Letters of Administration should be granted to the respondents.

The material portion of the judgment of the Appellate Court was as follows :—

"It was pressed on us at the hearing of the appeal that the judgment of the learned Judge on the Original Sida contains no finding or statement as to the time at which the adoption took place. It must be admitted that that is so. The learned Advocate for Ma Ywet met this argument by saying that the adoption took place when U Mya gave up his own house and moved to Ma Ywet's house a few days after Ma Ka's death. His position is that this moving of house was a definite act by which U Myn signified that he was fulfilling the promise which he had made to his dying sister to take Ma Ywet as his own daughter and never to part from her.

"This position is certainly the highest which, on the evidence, Ma Ywet could possibly take up. It seems, however, to entirely nullify the observation made by the learned Judge near the beginning of his judgment that disputes between U Myn and his sisters are of importance as being the foundation of his determination that his sisters should not inherit from him; for the disputes did not arise until some years after the date now fixed for the adoption.

"The learned Judge has found that U Mya spent a very considerable portion of his time after Ma Ka's death at Kawa and Thongwa, and there is no doubt about that fact. Moreover, I think it is certain that when U Mya gave up his own house in Rangoon he removed his furniture not to Ma Ywet's house but to Ma Ma's house at Kawa. The giving up of his own house, therefore, has very little significance; and if his permanent residence was in any one place more than another, it seems to have been at Kawa. But, assuming that his permanent residence was at Ma Ywet's house, I find it very difficult to say that that fact can be regarded as signifying that he had adopted Ma Ywet."

After referring to a case cited before them in which it was stated that the investigation of these claims was commonly undertaken many years after the date of the alleged adoption, the Appellate Court continued :—

"It might be added that the adopted child was usually adopted at such a tender age that he or she could not give any positive evidence of the act of adoption from his own knowledge. In both these points the present case is totally different. Ma Ywet is alleged to have been adopted about five years before the suit and when she was about 30 years of age. The reason, therefore, for not insisting on definite proof of the act of adoption entirely disappears . . ."

After distinguishing the case of *Ma Me Gale v. Ma Sayi* (1), which had been referred to in argument, the judgment proceeded:—

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"The admitted principle is that the relationship must be public and notorious, and it is only because in most cases the adoption took place many years before the suit and when the person adopted was a child, that definite evidence of the act of adoption is not required. When the alleged adoption was recent and the person adopted an adult, it lies on the person asserting the adoption, in my judgment, to prove it by definite and direct evidence, or to give very substantial reasons for not doing so.

"The finding of the learned Judge on the Original Side is based on the following points which he enumerates—

"1. Ma Ywet's original natural relationship to U Mya.

"2. His promise to her mother when dying to take and treat her as his own daughter.

"3. His abandoning his own house and going to live with her in the house where Ma Ka had died, and his continuing to live there till he died.

"4. His undoubted affection for her.

"5. His undoubted desire that she should inherit.

"6. His allusions to her as his daughter, and Pongyi U Ne Mein, and Maung Thaw as his adopted daughter.

"Points 1 and 4 require no remark.

"U Mya's promises to Ma Ka do not, I think, amount to a promise to adopt Ma Ywet. It was precisely the occasion on which, if adoption were intended, it would have been expressly mentioned; and it was not mentioned.

Moreover, even a promise to adopt would avail nothing without proof that the promise was carried into effect.

"Point 3 I have already dealt with.

"U Mya's desire that Ma Ywet should inherit was manifested near the end of his life, and the only view I can take of it is that his desires to make a gift, or a will, or to execute a formal deed of adoption, if they have any significance at all, signify that he had not yet adopted her; for if she were adopted nothing more would be necessary to cause her to inherit. I do not lay stress on this, any prudent man might guess that an adoption not effected by deed would be liable to be contested; but I merely remark that this part of the evidence does not help Ma Ywet's case.

"There remains the evidence that U Mya referred to Ma Ywet as his daughter or adopted daughter. After giving the fullest consideration to the words of their Lordships of the Privy Council above referred to, I think we are at liberty to rely on our own knowledge that Burmans use the words 'father,' 'mother,' 'son' and 'daughter,' very loosely, and to say that Mr. Dhar was perfectly correct in saying,—"It would be quite natural for an old man like that to refer to a niece who had lived with him for a long time as his daughter." This is the evidence of a witness for the respondent.

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"Mr. Justice Bigge observed,—'One of the difficulties of this case is the obviously simple way in which the word *adopted* can be interpolated into an otherwise correct statement.' I agree with that, and I would go farther and say that this infirmity attaches to the evidence of even truthful witnesses when relating conversations which took place at a time when there was nothing to lead them to attach any importance to the word *adopted*. The infirmity is still greater when the evidence has been recorded by a Judge who is not acquainted with Burmese, and when the Burmese terms used by the witnesses, and translated '*adopt*' and '*adopted*' have not been recorded.

"The learned Judge rejected, so far as the word *adopted* is concerned, all the evidence of U Mya's statement except that of U No Mein and Saya Thaw. Saya Thaw's statement seems to me extremely inconclusive. He begins—'He told me about disputes with his sisters and the adoption of his niece;' but he immediately follows that up by a detailed statement which refers to nothing but the conversation at Ma Ku's death-bed. In cross examination again he says—'In consequence of this he said he had brought her up as his daughter.' That is quite a different thing from adoption for the purpose of inheritance. It was only when repeatedly pressed in cross-examination that he committed himself to the statement that U Mya said he had adopted her. I think this evidence is worthless.

"But after all, the point is whether the relationship of father and daughter was public and notorious, and there is no evidence that it was. The evidence, such as it is, relates to private conversations between U Mya and the witnesses, and the circumstances under which the statements were made are such that, in nearly every case, the witness seems to have been ignorant of the relationship until it was specially made known to him by a private conversation with U Mya. This seems to me rather to indicate that the relationship was not generally known, and if the evidence is true it merely proves that U Mya made statements which may or may not be true. The statements are admissible under section 32 (5) of the Evidence Act, but their value is not very great, and they tend to disprove, rather than to prove, that the relationship of father and daughter was notorious.

"To sum up:—Though no particular ceremony is necessary for adoption, yet adoption cannot take place without some overt act or speech on the part of the person adopting; and when the person adopted was an adult, and the act of adoption was recent, it lies heavily on the person asserting the adoption to prove the overt act by direct evidence. Even if good cause be shown for dispensing with such evidence, the relationship of father and son, or father and daughter, must at least be proved to have been public and notorious. In this case there is no evidence whatever of any overt act by which adoption was effected. There is also no proof of notoriety. The evidence consists only of statements of U Mya, and many of the witnesses say that U Mya said he had adopted Ma Ywet before her mother's death—statements which Ma Ywet is obliged to repudiate because she took out Letters of Administration to her mother's estate.

"The evidence is, in my opinion, altogether insufficient to establish the facts of the adoption. I would, therefore, set aside the decree, and dismiss Ma

Ywet's petition, and declare that Ma Mi and Ma Me are entitled to Letters of Administration to the estate of U Mya."

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On this appeal which was heard *ex parte*,

DeGruyther, K.C., and *E. U. Eddis*, for the appellant, contended that the fact of her adoption was sufficiently established. The evidence was discussed in relation to the points on which the original Court relied which are set out in the judgment of the Appellate Court; and it was submitted that on all those points the probability was that the decision of the Judge who heard the evidence was right; and that what the Appellate Court held to be essential to, but wanting in, the appellant's case, namely, some overt act on the part of the person adopting, and the notoriety of the fact of adoption were satisfactorily proved. Reference was made to *Ma Me Gale v. Ma Sayi* (1), *Ma Gun v. Ma Gun* (2), *Ma Bwin v. Ma Yin* (3), *Maung Aing v. Ma Kin* (4), *Ma Mein Gale v. Ma Kin* (5), *Ma Gyan v. Maung Kywin* (6), *Ma Thine v. Ba Pe* (7), *Ma Sayi v. Ma Me Gale* (8), *Ma Tai Shwe v. Kau Gyi* (9), and Chan Toon's Principles of Buddhist Law.

The judgment of their Lordships was delivered by

LORD DUNEDIN. The only question in this appeal is whether Ma Ywet, the appellant, has proved that she was the adopted daughter of the late U Mya, who died in 1905. If she was, then she inherits U Mya's estate. If not, that estate is inherited by the respondents, Ma Me and Ma Mi, the sisters of the deceased.

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Ma Ywet is the daughter of Ma Ka, who was another sister of U Mya.

Ma Ka died in 1900, and up to that time there was no question of adoption, as Ma Ywet took out Letters of Administration to her mother as her child.

(1) (1904) 1 L. R. 32 Calc. 219, 228; (5) (1893) 1 Chan Toon's L. C. 168, L. R. 32 L. A. 72, 75. 170, 172.

(2) (1874) 1 Chan Toon's L. C. 147. (6) (1895) 1 Chan Toon's L. C. 393.

(3) (1878) 1 Chan Toon's L. C. 151. (7) (1897) 2 Chan Toon's L. C. 53.

(4) (1893) 1 Chan Toon's L. C. 157. (8) (1901) 2 Chan Toon's L. C. 181.

161.

(9) (1899) 2 Upper Burma Rep. 142.

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The story of the appellant is that, on the death-bed of her mother, her uncle U Mya promised her mother to adopt her, and that after her death he did so. Admittedly there was no specific occasion on which this was done by any quasi-ceremony or in presence of any witnesses or other persons.

It is said, however, that he acknowledged to other persons the fact that he had adopted her, and that his life and conduct in relation to her were consistent with the fact. This is denied by the respondents.

The learned Judge on the Original Side, before whom the suit depended, found that the appellant had sufficiently proved the fact of adoption; but this judgment was reversed on appeal, the learned Judges of the Appellate Court holding that the appellant had failed to make out her case.

It has already been laid down by this Board that, according to the law of Burma, no formal ceremony is necessary to constitute adoption. One may go further and say that, though adoption is a fact, that fact can either be proved as having taken place on a distinct and specified occasion, or may be inferred from a course of conduct which is inconsistent with any other supposition. But in either case publicity must be given to the relationship, and it is evident that the amount of proof of publicity required will be greater in cases of the latter category, when no distinct occasion can be appealed to.

The present case is one of these, and it is on the question of the want of publicity that the learned Judges of the Court of Appeal have differed from the Judge of original jurisdiction.

In many cases the inference of the relationship existing, and the publicity of the relationship itself, may naturally be taken from the facts of the life of the parties apart from the verbal statements of those concerned. Thus when a child who has natural parents leaves those parents and its own home, and is brought up in the house of another who treats it as a father would a child, the inference is not difficult to draw, and the facts from which that inference is drawn are public facts necessarily known to all the person's friends and acquaintances. Some of the decided cases are instances of this sort. In the

present case such considerations are unavailable, because before adoption is alleged to have taken place, Ma Ywet was 30 years old, was an orphan, and, as the niece of a childless uncle, was a natural person to live with him.

Accordingly the evidence of the publicity of the relationship alleged really comes to depend upon the testimony of Ma Ywet herself and the statements of the deceased U Mya spoken to by some of the witnesses. The learned Judges of the Appellate Court have held that the testimony falls short of being satisfactory. Their Lordships are unable to say that, in their opinion, the learned Judges are wrong in this opinion. In the case of an adult, when the inferences to be drawn from "bringing up" are necessarily absent, and where the consequence of adoption is disinherison of those entitled to succeed by law, it is, in their Lordships' view, especially necessary to insist on adequate proof. It would have been easy for the parties, by means of an actual, though not ceremonial, adoption in presence of witnesses, to have precluded the raising of subsequent questions. Where that has not been done, and where the fact of adoption is left to be inferred from past statements and conduct, it is, in their Lordships' opinion, a salutary rule that adequate proof of publicity or notoriety of the relationship should be insisted on.

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be dismissed.

As the respondents have not appeared in the appeal, there will be no order as to costs.

Appeal dismissed.

Solicitors for the appellant. *Sanderson, Atkin; Lee & Eddis.*

CRIMINAL REVISION.

Before Mr. Justice Coxe and Mr. Justice Ryves.

AKALOO CHANDRA DAS

v.

MOHESH LAL.*

1909
July 20.

Tolls—Dispute concerning the right to collect market tolls and not the possession of the market land—Possession under ekarnama as agent of co-sharer for collection of tolls and division of profits—Jurisdiction of Magistrate—Criminal Procedure Code (Act V of 1898) s. 145.

Section 145 of the Criminal Procedure Code does not apply to a dispute relating to the rights of co-sharers to collect tolls in proportion to their respective shares in a *hāt* and not to the possession of the *hāt* itself.

Where one of two co-sharers was entitled under an *ekarnama* to collect the tolls of the whole market and to divide the profits with the other co-sharer at the end of the year, and the lessee of the latter attempted to collect his lessor's share independently :—

Held, that the Magistrate had no jurisdiction to take proceedings under section 145 in such a case.

A Magistrate cannot under the section determine the method by which the possession of the parties is to be exercised or the agency by which the party in possession is to collect the profits of land.

Nritta Gopal Singh v. Chandi Charan Singh (1) followed.

Sri Mohan Thakur v. Narsing Mohan Thakur (2) distinguished.

Tarujan Bibee v. Asamuddi Bepari (3) referred to.

DHANESSUR LAL and Mathoor Mohan Das were the *seputnidars* of the Gohatta Bolarampur *hāt* in the district of Purneah, and held therein ten-annas and six-annas shares respectively. In November 1900, Mathoor executed an *ekarnama* empowering Dhanessur to collect also his six-annas share of the tolls in *ijmalī* and to divide the proportionate profits annually between them. On the death of Mathoor his son, the petitioner Kristo Mohan Das, became his heir, and he leased his undivided share in the *hāt* to the petitioner, Akaloo Chandra Das, in *ijara*

* Criminal Revision No. 548 of 1909, against the order of S. Karam Hussain, Deputy Magistrate of Purneah, dated March 24, 1909.

(1) (1906) 10 C. W. N. 1088.

(2) (1899) I. L. R. 27 Cal. 259.

(3) (1900) 4 C. W. N. 426.

on the 27th January 1909. The opposite party, Mohesh Lal, who had succeeded his father, Dhanessur, continued to collect the 16-annas tolls after the death of the latter. On the 31st January, Akaloo went to the *hât* with a body of men and tried to collect the six-annas tolls by force, whereupon Mohesh Lal complained to the police who, after inquiry, submitted a report the next day recommending proceedings under sections 107 and 144 of the Code against the petitioners. Thereupon the District Magistrate of Purneah issued notices under section 144, and drew up a proceeding under section 145 of the Code, on the 9th ultimo, against Mohesh Lal as first party and Akaloo as second party, to which the petitioner, Kristo Mohan, was subsequently added as a party with his lessee. Mohesh Lal filed a written statement on the 22nd instant admitting that Kristo Mohan was entitled to a six-annas share and was in possession thereof, but he claimed to have the right under the *ekrarnama* to collect the whole of the tolls. The share of Mohesh Lal was admitted by Kristo Mohan in his written statement, but his right to collect the entire toll was disputed, and the genuineness of the *ekrarnama* impugned. The District Magistrate by his order, dated the 24th March, declared Mohesh Lal to be in possession of the *hât*, whereupon the petitioners moved the High Court and obtained the present Rule.

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Babu Dasharathy Sannyal (Babu Hemendra Nath Sen and Babu Ramani Mohan Chatterji with him), for the petitioners. The *ekrarnama* was personal to its parties and is not binding upon Kristo Mohan. The dispute is one as to the right to collect the tolls of the *hât* and not as to the possession of it, and section 145 does not apply. He relied mainly on *Nritta Gopal Singh v. Chandi Charan Singh* (1) and *Radha Raman Ghose v. Baliram Ram* (2).

Mr. Chatterjee (Babu Jotindra Nath Banerjee with him), for the opposite party. The deed is binding on the successors of the parties to it. Mohesh Lal has all along collected the

(1) (1906) 10 C. W. N. 1088.

(2) (1904) I. L. R. 32 Calc. 249.

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tolls of the *hāt* and is in possession. Section 145 applies to this case: *Sri Mohan Thakur v. Narsing Mohan Thakur* (1).

Cur. adv. vult.

COXE AND RYVES JJ. This is a Rule on the District Magistrate of Purneah to show cause why an order under section 145 of the Criminal Procedure Code should not be set aside on the ground that the Magistrate had no jurisdiction to pass any order in respect of the subject-matter of the dispute in which the parties claimed to be jointly interested.

The Magistrate has submitted an explanation, but does not refer therein to the difficulty which has occasioned the Rule.

It appears that the first party, Mohesh Lal, and Kristo Mohan Das of the second party, are entitled to the market in dispute. The former is entitled to ten annas and the latter to six annas. Akaloo Chandra, the other member of the second party, is a lessee from Kristo Mohan Das. The Magistrate finds that Mohesh Lal of the first party obtained an agreement from the father of Kristo Mohan Das authorizing him to make collections of the whole of the tolls, and to divide the shares at the close of each year. Under this agreement he collected the whole of the tolls. Akaloo attempted to collect a six-annas share but was prevented, and has never been able to enforce his rights. The written statement of the first party fully admits that Kristo Mohan Das not only is entitled to a six-annas share of the collections from the market, but is actually in possession thereof. Indeed, if Mohesh Lal is collecting his share on his behalf, and giving it to him, it is difficult to see how Kristo Mohan Das' possession can be denied. There is nothing to show that this agreement is irrevocable, and Mohesh Lal's collection of tolls under it must, we think, be regarded, so far as the six-annas share is concerned, as a collection by him of Kristo Mohan Das' tolls in the capacity of Kristo Mohan Das' agent. This being so, we do not think that the order of the Magistrate can be regarded as within jurisdiction. He

is entitled to decide which of the parties is in possession. Here the possession is undisputed, and the only dispute that exists relates to the machinery by which Kristo Mohan Das exercised his possession. The view that we take appears to us to be supported by the decision in the case of *Nritta Gopal Singh v. Chandi Charan Singh* (1), the circumstances of which case are very similar to those of the case now before us. Doubtless, if Mohesh Lal was in possession in the capacity of a lessee or under some agreement that Kristo Mohan Das could not terminate, the position might be different, and in such a case an order under section 145 of the Criminal Procedure Code might perhaps be permissible.

The learned counsel for the opposite party relies on the case of *Sri Mohan Thakur v. Narsing Mohan Thakur* (2). That case, however, was distinguished in the case which we have already cited, and the effect of the previous decision, on which it was to a great extent based, is somewhat weakened by the decision of the same learned Judges in the case of *Tarujan Bibee v. Asamuddi Bepari* (3).

We think that the findings of the Magistrate are tantamount to a decision that the second party is in possession of the six annas of the disputed market, and, that being so, we think the Magistrate had no jurisdiction to pass orders under section 145 of the Criminal Procedure Code. He cannot decide under that section the method by which the possession is to be exercised, or the agency by which the person in possession is to collect the profits. The Rule is accordingly made absolute. The costs, if paid, will be refunded to the petitioners.

Rule absolute.

(1) (1906) 10 C. W. N. 1088.

(2) (1899) I. L. R. 27 Calc. 239.

(3) (1900) 4 C. W. N. 426.

INSOLVENCY JURISDICTION.

Before Mr. Justice Fletcher.

1909

July 23.

In re OFFICIAL ASSIGNEE'S COMMISSION.*

Official Assignee—Sale of Insolvent's Estate—Commission on sale of mortgaged property—Indian Insolvency Act (11 & 12 Vic. c. 21) ss. 19, 21, 31—Supreme Courts' Officers Act (XV of 1848) ss. 1, 2—Practice.

On the application of the mortgagee, an order was made in Insolvency proceedings directing the Official Assignee to sell certain immoveable properties belonging to an insolvent, but which were subject to a mortgage:—

Held, that the Official Assignee was not entitled to charge a commission out of the insolvent's estate on the full value of the properties sold, but only on the amount coming to the insolvent's estate.

Held, also, that although the practice of this Court for over thirty years had apparently been to allow such commission, it was contrary to the provisions of the Indian Insolvency Act (11 & 12 Vic. c. 21) and the Supreme Courts' Officers Act, 1848.

In re Howard Brothers (Insolvent) (1) commented on.

THE facts are as follows. Certain immoveable properties belonging to an insolvent were under a mortgage. The mortgagee, with the consent of the Official Assignee, applied for an order authorising the said Assignee to sell the mortgaged property in order that the mortgagee might be paid off. The order was made, but when it was drawn up the Official Assignee found that instead of being allowed the usual commission on the full value of the mortgaged property, he had been allowed commission only on the amount actually coming to the insolvent's estate. An application was, therefore, made for leave to speak to the minutes, so that the order might be altered and commission allowed on the full value of the mortgaged properties.

Mr. Zorab (Mr. Camell with him), for the Official Assignee. For over thirty years the Court allowed the Official Assignee

* Application in the matter of Banku Bohari Ghose, an Insolvent.

(1) (1874) 13 B. L. R. App. 9.

a commission on the full value of the properties sold by him, whether they were mortgaged properties or not.

[FLETCHER J. Is he entitled to a commission except on the amount coming to the insolvent's estate ?]

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Yes, he has been allowed the usual commission on the full value of the mortgaged property. The practice is now well settled and ought not to be disturbed: *Nobokishore Sarma Roy v. Hari Nath Sarma Roy* (1) and *Kusum Kumari Roy v. Satya Ranjan Das* (2). When he sells these properties, he does not do so in his character as Official Assignee. He does so in the character of an auctioneer. The Court is not bound to select the Official Assignee to sell such properties, but generally he is appointed he being the most convenient person. This practice of paying the commission on the full value sprang up since 1794. It is true that this practice has not been uniform till 1875. There are, however, some orders even before this. The only reported case on this point is *In the matter of Howard Brothers (Insolvents)* (3).

[FLETCHER J. It does not seem that the provisions of the Supreme Courts' Officers Act of 1848 were placed before the Court in that case.]

When the Official Assignee is acting under an order of the Court, that Act would not affect him. [Refers to a large number of instances occurring since 1874, where such commission was allowed.]

Cur. adv. vult.

FLETCHER J. This case has been mentioned on the application of the Official Assignee to speak to the minutes of an order made in Insolvency Proceedings directing the Official Assignee to sell certain immoveable properties which are subject to a mortgage. The order was made on the application of the mortgagee with the consent of the Official Assignee. The reason that the Official Assignee has required that the

(1) (1884) I. L. R. 10 Calc. 1102, 1110. (2) (1903) I. L. R. 30 Calc. 999, 1003.

(3) (1874) 13 B. L. R. App. 9.

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minutes should be spoken to is on account of the Chief Clerk having drawn the minutes of the order as allowing the Official Assignee's commission only on the amount coming to the insolvent's estate, whereas the Official Assignee claims that he is entitled to commission out of the insolvent's estate on the full value of the property.

The matter is one of considerable importance. In some cases the commission that has been paid to the Official Assignee in respect of the sale of the immovable property of an insolvent out of the insolvent's estates when the same has been subject to mortgages, has worked out at a very high percentage. The Official Assignee says, however, that he has been allowed by the Court for so many years to charge these commissions that the settled practice to allow him the commission must be taken to be valid.

Now, the office of the Official Assignee is constituted under the Indian Insolvency Act, 1848. In that Act there are three sections that are most important with reference to this application. The first is section 10 and is as follows:—

"And be it enacted, that no remuneration whatever," (and to my mind the word remuneration is very important) "whether in the shape of commission or otherwise, shall be received by any Assignee, except in the manner nor beyond the extent hereinafter allowed; (that is to say) the Court may allow a fair remuneration to the Assignee or Assignees out of the sum to be distributed as dividends, and make an order accordingly."

The other two sections are sections 21 and 31. Section 21 defines the duties of the Official Assignee upon the adjudication and directs that "he shall, with all convenient speed, take possession by himself or by means of messengers of the Court, or by other fit and proper persons, of all the real and personal estate and effects of the insolvent of which immediate possession may be obtained, and shall use his best endeavours to seize, obtain, recover, and reduce into possession, as speedily as possible, the rest of such estate and effects, and all debts, claims, and choses in action, which by virtue of his appointment

under this Act, and of the vesting order or adjudication, he shall have been empowered to obtain, recover, and get in."

Section 31 sets out the duties of the Assignee as to realisation of the insolvent's estate and runs as follows :—

"The Assignee or Assignees shall, with all convenient speed, make sale of the property and effects of the insolvent : provided nevertheless, that the Court shall have full power and authority, upon the application of any insolvent, or only creditor or mortgagee of such insolvent, to delay or postpone the sale of any property, and to make such other order respecting the same as to such Court shall seem meet."

The statute, therefore, provides that it is the duty of the Official Assignee to sell the property of the insolvent with all convenient speed, and as to his remuneration for doing so, the Act says the only reward that he is to get for so doing is a commission on the amount to be distributed as dividends. If, for the purpose of realising the estate more favourably, it is necessary for the Official Assignee to join with the mortgagee in selling the property, there can be little doubt that it is his duty to do so. There can be little, if any, more trouble in selling the equity of redemption in a property than in selling the property free from incumbrance. I can see no warrant for saying that the Official Assignee is entitled to calculate his commission on the full value of the mortgaged properties. In fact Mr. Zorah, for the Official Assignee, had to admit that the Official Assignee could not claim his commission as Official Assignee, but he claimed it *qua* auctioneer. But on that view of the case, the Official Assignee is met with the provisions of the Supreme Courts' Officers Act from which provisions the Court cannot dispense him. Besides which it can hardly be suggested that a trustee having power to sell by auction can employ himself as the auctioneer and charge the trust estate with his commission as auctioneer. The only difficulty in the case is that the Official Assignee has been permitted for many years to take these commissions. Up to the year 1875, the orders produced before me appear to vary. From that date apparently the orders have allowed the Official Assignee to take the

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commission now claimed. The only reported case, however, appears to be *In re Howard Brothers, Insolvents* (1), and the attention of the Court in that case was not called to the Supreme Courts' Officers Act. Having regard to the very express words used both in the Indian Insolvency Act, 1848, and the Supreme Courts' Officers Act, I think that the order as drawn up by the Chief Clerk is correct.

This application, therefore, fails and must be dismissed.

Application refused.

S. C. R.

(1) (1874) 13 B. L. R. App. 9.

CRIMINAL REVISION.

Before Mr. Justice Cose and Mr. Justice Ryers.

MALIK PRATAP SINGH

v.

KHAN MAHOMED.*

1909
July 24.

High Court, jurisdiction of—Power to revise orders of discharge by Presidency Magistrates, and to direct further inquiry—Criminal Procedure Code (Act V of 1898) ss. 423, 439—Charter Act (24 and 25 Vic., c. 104) s. 15.

The High Court has power, under section 439 read with section 423 of the Criminal Procedure Code, to revise an order of discharge passed by a Presidency Magistrate and to direct a further inquiry, if there are good reasons for doing so, although no question of jurisdiction arises in the case.

Hari Dass Sanyal v. Saritulla (1), *Colville v. Kristo Kishore Bose* (2), *Duarka Nath Mondul v. Beni Madhab Banerjee* (3) and *Emperor v. Varjivandas* (4) followed. *Bellew v. Parker* (5) referred to.

Charoobala Dabee v. Barendra Nath Mozundar (6), *Kedar Nath Sanyal v. Khutra Nath Sikdar* (7) and *Debi Bux Shroff v. Jitmal Dungarwal* (8) discussed and dissented from.

The High Court cannot interfere, under section 15 of the Charter Act, with the order of a subordinate Court on the ground of an error in law, but only for

* Criminal Revision No. 710 of 1909, against the order of P. N. Dutt, Fourth Presidency Magistrate of Calcutta, dated May 27, 1909.

(1) (1888) I. L. R. 15 Calc. 608.

(5) (1903) 7 C. W. N. 521.

(2) (1899) I. L. R. 26 Calc. 746.

(6) (1899) I. L. R. 27 Calc. 126.

(3) (1901) I. L. R. 28 Calc. 652, 667.

(7) (1907) 6 C. L. J. 705.

(4) (1902) I. L. R. 27 Bom. 84.

(8) (1906) I. L. R. 33 Calc. 1282.

an error affecting jurisdiction, that is, either a want or refusal of jurisdiction or an illegality in the exercise of it.

Tej Ram v. Harsukh (1) and *Corporation of Calcutta v. Bhupati Roy Chowdhry* (2) referred to.

Where on the admission of the accused an offence of criminal misappropriation might have been established, and the Magistrate did not consider or elicit matters of vital importance in the case—

Held, that there had been no proper inquiry into the charge, and that there were *prima facie* grounds for directing a further inquiry.

Ram Lozan Dhobi v. Inglis (3) and *Hari Moods v. Kumode* (4) distinguished

THE petitioner, who was a military contractor at Rawalpindi, entrusted the opposite party, Khan Mahomed, from time to time, with various sums of money, amounting to Rs. 3,550, for the purchase of Hessian cloth and other articles as a commission agent. It appeared that the latter deposited Rs. 300 with the Budge-Budge Mills and spent another sum in the business he undertook, leaving a balance of Rs. 2,774 in hand, which, it was alleged, he refused to return though called upon to do so. The police thereupon charged him with cheating and criminal breach of trust under sections 420 and 409 of the Penal Code before the Chief Presidency Magistrate, and the case came on before the Fourth Magistrate for trial. He admitted before the latter the receipt of Rs. 3,550 for the purposes specified by the complainant, and a present credit balance of Rs. 2,774 which, he stated, was never demanded from him by the petitioner. On the 1st May 1909 the Magistrate held that the charge of cheating would not lie on the facts, but he found that the accused was entrusted with the money by the complainant within the meaning of section 405 of the Penal Code, and that he had spent part of it not in the way he should have done but in distinct violation of the terms of the trust. He, however, referred the question of the liability of the accused to the High Court under section 432 of the Criminal Procedure Code. On the return of the reference with the directions of the High Court that it was open to him to frame either alternative charges under sections 409 and 420 of the Penal Code, or a charge under section 409 thereof, according to the state

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(1) (1875) I. L. R. 1 All. 10.

(2) (1898) I. L. R. 26 Calc. 74.

(3) Unreported.

(4) Unreported.

inquiry in a case in which a Presidency Magistrate has discharged an accused person, and reliance has been placed on three rulings of this Court to which we shall refer later.

We think it must be conceded that we can only interfere, if at all, under section 439 of the Code. There is here no question of jurisdiction. If the Magistrate has erred, his error is merely one of law. It was held in *Tej Ram v. Harsukh* (1), which was followed in *Corporation of Calcutta v. Bhupati Roy Chowdhry* (2), that a High Court cannot interfere, under section 15 of the Charter Act, with the order of a Court subordinate to it on the ground of an error in law. There must be an error that affects jurisdiction—either want of jurisdiction, or a refusal of jurisdiction, or an illegality in the exercise of jurisdiction. This view is also expressed in *Kedar Nath Sanyal v. Khetra Nath Sikdar* (3).

As to our powers under the Criminal Procedure Code, apart from the case law, we would have had no hesitation whatever in holding that this Court has ample powers to interfere. Section 435 enables us to call for the record of any proceeding of any subordinate Criminal Court, and it is beyond doubt that the Court of a Presidency Magistrate is such a Court. Having called for and received such record, our powers of disposing of the case are enumerated in section 439, and we are enabled to exercise "any" of the powers conferred on a Court of Appeal by section 423, among other sections. One of the powers conferred on this Court as a Court of Appeal is the power of directing that an accused be retried or committed for trial. It seems to be quite clear that in a case in which a Presidency Magistrate acquits an accused person, this Court may, in the exercise of its revisional jurisdiction, for proper reasons, set aside the order of acquittal and order a retrial or commitment to the Court of Sessions: *Bellew v. Parker* (4). It would be strange if the Legislature enabled us thus to interfere in the case of an acquittal, but, nevertheless, gave us no power of interference in the case of an order of discharge.

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(1) (1875) I. L. R. 1 All. 101.

(3) (1907) 6 C. L. J. 705.

(2) (1898) I. L. R. 26 Cal. 74.

(4) (1903) 7 C. W. N. 521.

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The cases on which reliance has been placed are *Kedar Nath Sanyal v. Khetra Nath Sikdar* (1), *Debi Bux Shroff v. Jutmal Dungarwal* (2) and *Charoobala Dabee v. Barendra Nath Mozumdar* (3).

In *Kedar Nath Sanyal v. Khetra Nath Sikdar* (1) the application to this Court was made under section 437 of the Code of Criminal Procedure, and it was there held that that section had no application to a Presidency Magistrate. In *Debi Bux Shroff v. Jutmal Dungarwal* (2) it was held that "this Court cannot direct a further inquiry under section 437, neither have we power to interfere under section 439 of the Code." But there, as the report says, it was not contended that this Court could interfere under either of these sections. The argument of the learned Advocate-General in support of the Rule rested on the assumption that this Court could interfere only under section 15 of the Charter Act. This case is, therefore, not a strong authority on the question now raised, and the *dictum* that this Court could not interfere under the provisions of the Code may be regarded as *obiter*. *Charoobala Dabee v. Barendra Nath Mozumdar* (3), however, is a distinct authority for the proposition that this Court cannot interfere under the Code. On page 129 of the report, the *ratio decidendi* is expressed as follows:—"Section 439 confers on the High Court, as a Court of Revision, all the powers of an Appellate Court under section 423. But section 423 does not enable a Court of Appeal to direct that further inquiry be made into a case in which an order of discharge or dismissal may have been passed. Section 423 confers a power to direct further inquiry only in respect of a case of an appeal from an order of acquittal, and that this power is so limited is shown by an express enactment in section 437 to provide for such orders being passed." This is the only reason that has ever been assigned for the view that the High Court cannot order further inquiry after discharge by a Presidency Magistrate, and it may reasonably be inferred that it was for this reason

(1) (1907) 6 C. L. J. 705.

(2) (1906) I. L. R. 33 Calc. 1282.

(3) (1909) I. L. R. 27 Calc. 126.

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that the learned Judges held in the two other cases cited that the High Court could not interfere under the Code. Exactly the opposite view was taken in *Colville v. Kristo Kishore Bose* (1), and in an unreported case of this Court which is referred to in the judgment in *Charoobala Dabee v. Barendra Nath Mozumdar* (2). Under these circumstances, we would have expected that the learned Judges who decided this latter case would have referred the question to a Full Bench, and we would have thought it necessary now so to refer it, if we did not think that a Full Bench of this Court had already decided the point.

In the Full Bench case of *Dierks Nath Mondul v. Beni Mathab Binerjee* (3), Ghose J., at page 667, is reported to have said—"It is, however, said that sections 436 and 437 do not apply to Presidency Magistrates [see the observations of the learned Chief Justice in *Queen-Empress v. Dolegobind Dass* (4)], but, conceding that this is so, there can be, I think, no doubt that sections 435 and 439 are applicable, and they confer upon the High Court the power of sending for the record of any inferior tribunal, and reversing the order of the Magistrate, including the power of ordering a further inquiry in the case of an improper discharge. And this was the view that was adopted in respect to an order made by a Provincial Magistrate in the Full Bench case of *Hari Dass Sanyal v. Saritulla*" (5). The learned Judge then goes on to deal with the case of *Charoobala Dabee v. Barendra Nath Mozumdar* (2) and observes: "I am here confronted by certain observations of Sir Henry Prinsep and Hill J.J. in the case of *Charoobala Dabee v. Barendra Nath Mozumdar* (2) where, in referring to the power of the High Court under section 439 read with section 423, they stated that the latter section 'does not enable a Court of Appeal to direct that further inquiry be made into a case in which an order of discharge or dismissal may have been passed.'" And he proceeds to point out that that view, which, as we have pointed out,

(1) (1899) I. L. R. 26 Calc. 746.

(3) (1901) I. L. R. 28 Calc. 652.

(2) (1899) I. L. R. 27 Calc. 126.

(4) (1900) I. L. R. 28 Calc. 211.

(5) (1888) I. L. R. 15 Calc. 608.

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is the real basis of all the decisions that we have quoted, is opposed to the view of the Full Bench in *Hari Dass Sanyal v. Saritulla* (1).

It has been argued, however, that in this latter case the present question was not before the Full Court. Wilson J. in delivering his judgment, with which four other learned Judges of this Court concurred, stated that the three questions before the Court were—“(i) On what grounds is an order of discharge made under section 209 or section 253 liable to be set aside by a Court of Revision? (ii) What Courts have jurisdiction to set it aside, and (iii) What orders are proper to be made if an order of discharge is to be set aside;” and he came to the conclusion that “the High Court, under section 423 embodied in section 439, can set aside the order of discharge, and direct a charge to be framed and tried by the proper Court. It can, under section 437, and probably also under section 439, order a further inquiry instead of a committal.” These observations are perfectly general, and we think apply equally to all orders of discharge passed by subordinate Criminal Courts. In the Bombay High-Court in *Emperor v. Varjivandas* (2), the ruling of this Court in *Colville v. Kristo Kishore Bose* (3) was followed, and the opposite ruling in *Charoobala Dabee v. Barendra Nath Mozumdar* (4) was dissented from, and in that case also, the decision of the Full Bench in *Hari Dass Sanyal v. Saritulla* (1) was relied upon. For these reasons, I think we have full power under the Criminal Procedure Code to order a further inquiry in this case, if there appear good reasons for so doing.

The complainant, Malik Pratap Singh, complained against Khan Mahomed of having cheated him in respect of a sum of Rs. 3,550 on the 4th and 5th of December 1908 and on the 8th of January 1909, at 37 Ezra Street, by false representation. The case was instituted by the police under section 420 of the Indian Penal Code, and was so regarded by the learned Presidency Magistrate. The complainant and a large number of witnesses were examined for the prosecution, and the pro-

(1) (1888) I. L. R. 15 Calc. 608.

(2) (1902) I. L. R. 27 Bom. 84.

(3) (1899) I. L. R. 26 Calc. 746.

(4) (1899) I. L. R. 27 Calc. 128.

secution case was closed on the 29th April 1909. Thereupon, the learned Magistrate wrote out an order submitting the case for the opinion of this Court under section 432 of the Criminal Procedure Code. It appeared to him to be very doubtful whether the charge of cheating under section 420 could possibly lie, but he seemed to be of opinion that a charge under section 409 might be sustained. He says—"I think in this case the accused was entrusted with the money by the prosecutor within the meaning of section 405 of the Indian Penal Code, and he spent part of it, namely, Rs. 2,774, not in the way he should have done but in distinct violation of the terms of the trust or the contract." Throughout the whole of the inquiry no question was asked bearing on the issue as to whether the accused had misappropriated the complainant's money. This Court returned the Reference to the learned Presidency Magistrate pointing out that it did not strictly arise under section 432, but that it was open to him to charge the accused in the alternative under sections 420 and 409, or under section 409, if the evidence disclosed that offences under these sections or either of them had been committed. He, thereupon, recalled the complainant on the 14th May, and the complainant then stated that he had asked the accused for the money and that he had not been paid. No further inquiry seems to have been made, and on the 27th May the learned Magistrate decided that, in the absence of a definite direction from this Court, he was bound to rely on two unreported cases which he set out in his order and discharge the accused. In the first case, all that was proved was that the *dhoti* had not returned some clothes which the complainant said he had given to him to wash. There was no finding that the *dhoti* had converted them to his own use. The fact that when charged he, to save himself, falsely denied that he had received the clothes, would not necessarily establish his guilt. He might have lost them or sent them to another customer by mistake. It does not appear he denied receipt before the institution of the case. In the second case, there was no finding in the lower Court's judgment as to any dishonest misappropriation by the accused or conversion to his

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(1) (1888) L. L. R. 15 Calc. 608.

(2) (1902) L. L. R. 27 Bom. 84.

(3) (1899) L. L. R. 26 Calc. 746.

(4) (1899) L. L. R. 27 Calc. 123.

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own use of the ornaments said to have been pledged by the complainant. In the absence of such a finding no conviction could be had. The ruling does not lay any general rule of law. It seems to us that the facts on which those two cases were decided are very different. In this case, the accused has admitted that he received Rs. 3,550 for the purpose of purchasing specific articles, that he only spent a small amount of that money in purchasing a few of those articles, and he further admits that the balance is still with him. The reason why he states he did not spend all the money on the objects for which it was given to him is that the complainant telegraphed to him stopping him. He admits that the rest of the money is in his hands, but denies that the complainant ever asked him to return it. Under these circumstances, a charge of criminal misappropriation under section 409 of the Indian Penal Code may be established. But we think that there has been no proper inquiry into this charge. There is apparently some evidence that the accused absconded, a fact which, if proved, might have an important bearing on the question whether he had misappropriated the money, but the Magistrate apparently has not considered this evidence, nor has he attempted to elicit when and under what precise circumstances the demand for the money, if any, was made, and what answer or explanation was then given by the accused. These points are of vital importance, and when they have been lost sight of we think there are *prima facie* grounds for holding that further inquiry should be held.

We, therefore, order that the record be returned to the learned Presidency Magistrate, and direct him to inquire further into the charge under section 409 of the Indian Penal Code.

F. B. M.

Rule absolute.

PRIVY COUNCIL.

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[On appeal from the High Court at Fort William in Bengal.]

Hindu Law—Endowment—Creation of Endowment—Proof of Dedication to Idols—Alienation of endowed property—Construction of grant of Debutter property—Ancient Document—Evidence, Act (I of 1872) s. 90—Power of Mohant to grant lease in perpetuity at fixed rent—Landlord and Tenant—Limitation, Act (XV of 1877) Sch. II, Arts. 134, 144—Bond fide Purchaser

The origin of title to the property in suit was a sanad of 1787 granted by the Raja of Pandra to the predecessor in title of the plaintiff, the sebat of a shrine managed by Goswamis among whom the office of Mohant had descended for more than 160 years by the rule of lineal primogeniture, in the following terms:—

"To the remembered and abode of all blessings, Sri Bichitrnanda Mohant Goswami, of good character. This deed of pottah of *debutter* property is executed to the following effect. I do grant to you by way of lakhernj *debutter* the entire mouzah of Gorfalbari in pergunnah Pandra. . . . By bestowing your blessings on us you do enjoy and possess the same with fresh felicity. If I or any of my heirs ever dispossess you, the dispossession shall be ineffectual."

The evidence in the case showed that the donee received the gift as one for the service of the particular idols whose sebat he was, and that the income of the mouzah had ever since been entirely appropriated for that service. In 1860 the then Mohant describing himself as "brittibhogi-holder of *debutter*," granted to the predecessor in title of the defendants a *mokurari pottah*, or permanent lease, of the mouzah in which it was described as "my long-standing ancestral lakheraaj *debutter* property endowed for the service of the deity." In a suit brought to set aside the lease as being beyond the powers of the Mohant and therefore void, it was contended by the defendants that though the grant was to the Mohant and "by way of lakheraaj *debutter*," there was no complete or specific dedication of the mouzah to the service of any idol, but that the gift was to the Mohant personally and descendible to his heirs:—

Held, by the Judicial Committee (reversing the decision of the High Court) that, under the circumstances of, and on the evidence in, the case, the mouzah was *debutter* property in the sense of having been dedicated to the worship of the idols represented by the Mohant to whom it had been originally granted. Though the mere fact of the proceeds of any land being used for the support of an idol may not be proof that that land formed an endowment for the purpose, yet it was a fact that might well be taken into consideration, when, as in this

* Present: LORD ATKINSON, LORD COLLINS, SIR ANDREW SCOBLE and SIR ARTHUR WILSON,

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case, the intention of the founder had to be gathered from an ancient document expressed in ambiguous language.

Muddun Lall v. Komul Bibee (1) followed.

There was no allegation of any special circumstances of necessity to justify the grant of the lease which was subject to a fixed rent-charge, payment of which had all along been made to the Mohant:—

Held, that the power of a Mohant to alienate *debbuttar* property being, like the power of a Manager for an infant heir, limited to cases of unavoidable necessity [*Prosunno Kumari Debye v. Gola's Chand* (2)], a permanent lease at a fixed rent, though adequate at the time, was "a breach of duty in the Mohant," and on the most favourable construction could not only enure for the life of the grantor and was not binding on his successors.

Shibessouree Debia v. Mothooranath Acharjo (3) followed.

It was also contended that a *makurari* lease was tantamount to a conveyance in fee simple, and that the lessees must, therefore, be treated as "purchasers" within the meaning of article 134 of Schedule II of the Limitation Act (XV of 1877), and the suit was consequently barred by lapse of time, and the High Court so decided:—

Held (reversing that decision) that the words "purchased for a valuable consideration" in that article meant that the ownership of the property sold had been absolutely transferred from the vendor to the purchaser in consideration of the price. But a lease in perpetuity left some interest in the lessor, and such a lease, though permanent, was forfeitable: *Kally Dass Ahiri v. Monmohini Dassce* (4). The purchaser must be the purchaser of an absolute title. The defendants were, therefore, not purchasers under article 134, and the suit was not barred.

APPEAL from a judgment and decree (17th February 1906) of the High Court at Calcutta which reversed a judgment and decree (29th June 1905) of the Subordinate Judge of Manbhum.

The plaintiffs were the appellants to His Majesty in Council.

The suit out of which this appeal arose was brought on 29th September 1904 by the first appellant Abhiram Goswami (a minor suing by his mother and next friend Nrittomoyi Debi), the Mohant of a shrine of two Hindu idols known as Raghunath Jiu and Durga Mata, and Messrs. Burn and Company, the lessees of the first plaintiff. The plaint sought a declaration that a village called Gorfalbari granted in 1787 by the Raja of Pandra to the predecessors in title of the first plaintiff for the support of the idols was *debbuttar* property; and that

(1) (1867) 5 W. R. 47, 48.

(2) (1875) 14 R. L. R. 450.

L. R. 2 L. A. 145.

(3) (1869) 13 Moo. L. A. 270, 275.

(4) (1897) L. L. R. 24 Cal. 440, 447.

two leases of portions of the village, dated 6th February 1860, and 2nd November 1896, under which the defendants held, were invalid as being beyond the powers of the then Mohant to grant; and prayed for possession of the village, or in the alternative for a declaration that in any event no title to any "underground rights" passed to the defendants under the said leases.

The defence was that the suit was barred by limitation; and that the village in suit was not *debuttar* property, but the personal estate of the Mohant who granted the leases which it was sought to set aside.

The Subordinate Judge held that the suit was not barred by limitation; that the sanad of 1787 was an ancient document and had come from proper custody; that the village in suit was shown to be *debuttar* property; and that the Mohant for the time being had no power to alienate the property and the leases, under which the defendants held, were therefore invalid. He accordingly decreed possession of the village to the plaintiffs with mesno profits and costs.

On appeal a Divisional Bench of the High Court (SIR F. MACLEAN C.J. and MR. JUSTICE GEIDT) held that the suit was barred by limitation; that the village in suit was not *debuttar* property, but was the personal property of the family to which the Mohant belonged; and that the lease, dated 6th February 1860, conveyed to the lessee a right to the subsoil and to minerals. The High Court, therefore, reversed the decision of the Subordinate Judge and dismissed the suit with costs.

The facts of the case are fully set out in the report of the appeal to the High Court, and in the judgment of that Court now appealed from which will be found in I. L. R. 33 Calc. 511.

Whilst this appeal was pending Ahluram Goswami died, and his mother Nittonmoyi was allowed by the Court to represent him on this appeal.

On this appeal,

DeGruyther, K.C., and G. E. A. Ross, for the appellants, contended that the village in suit was "*debuttar*" property.

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By the sanad of 1787, which was an ancient document and produced from proper custody, the village was granted as "*debttar*." Reference was made to Wilson's Glossary, page 134, to show that "*debttar*" meant the property of an idol, and to the same authority at page 93 to show that the word "*bramottar*" would properly have been used, had it been the intention that the property conveyed should be the "property of the Mohant." The grant, therefore, was intended to be one to the idols. There was no provision in the sanad for the succession of the Mohants which would have been the case if the gift had been intended to be the personal property of the Mohant; but which was unnecessary in the case of a gift to an idol which was a corporation sole. The reference to the possibility of dispossession by the grantor and the statement that it would be ineffectual confirmed the construction put upon the grant by the appellants as did the recital describing the property in the lease of 1860. The best evidence as to whether the property was the endowed property of the idols was the manner in which it had been dealt with from the time of the grant in 1787 up to the present time; and it would be found that it had always been treated as endowed and not private property. Evidence of members of the family showed that it was *debttar*; that the proceeds of it had all along been spent for the purposes of the sheba; and that the *debttar* property of the idols, including the village in suit, always was and is in the possession of the Mohant alone. Had it been the personal property of Bichitrnanda, all his descendants would have taken shares of it; and the fact that this did not happen proved conclusively that the village was the property of the idols, and never the private property of the Mohant himself. It was submitted, therefore, that the High Court was wrong in holding that the village in suit was not *debttar* property.

It was also contended that the lease of 6th February 1860, if intended to be a transfer in perpetuity, and if the property was *debttar*, was beyond the powers of the Mohant to execute: it was neither alleged nor proved that the lease was granted for legal necessity which alone would justify a Mohant in so

alienating it. That being so, the lease should be held not to give a permanent right of occupancy. Reference was made to *Moyandi Chettiur v. Chokkulingam Pillay* (1).

It was further contended that the suit was not barred by limitation. Article 144 of Schedule II of Act XV of 1877 was said to bar it because the possession of the lessees became, on the death of Pranananda in 1801, adverse to Raghahananda, his successor in the Mohantship, and the suit had not been brought within twelve years from that date. But Raghahananda was insane from 1896 to the date of his death, 10th June 1900, and Abhiram, the plaintiff, his successor, was a minor up to the date of suit, 29th September 1904, so that, in that view, under section 7 of the Limitation Act (XV of 1877), the suit would be in time. Nor was it barred by article 134 of the Act which only applied, it was submitted, to a *bonâ fide* purchaser, whereas Ananga Mohini Debi, the lessee in this case, took the property with the knowledge that it was "*debutter*," and was therefore not a purchaser within the meaning of that article. For the same reason she was not an "assign for valuable consideration" within the meaning of section 10 of the Limitation Act. The lessee, moreover, did not under the lease acquire an absolute title, and it was held in the case of *Rodhanath Das v. Gisborne & Co.* (2) that under section 5 of the old Limitation Act (XIV of 1859) which corresponded with article 134 of the present Act, that the word "purchased" in that section meant the acquisition of an absolute title as purchaser, and could not mean "mortgaged" or "leased"; so that article 134 was inapplicable to Ananga Mohini Debi and her representatives in title in the present suit. Reference was also made to *Ram Churn Tewary v. Protap Chunder Dutt Jha* (3); Limitation Acts (IX of 1871) section 10, and XV of 1877, section 10. But the original lessee and the present defendants, her successors in title, had paid the rent reserved under the lease regularly up to 1902, and if the property were *debutter* and the lease consequently void, they should be treated as being tenants from

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(1) (1904) I. L. R. 27 Mad. 291;
L. R. 31 I. A. 83.

(2) (1871) 14 Moo. I. A. 1.
(3) (1886) 2 C. L. J. 448.

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year to year of the Mohant, and then there was no question of adverse possession and therefore no limitation. A tenant could not convert his tenure (when it was invalid) into a proprietary tenure by being in possession for twelve years while paying the rent charge reserved by the lease. Reference was made to *President and Governors of Mogdalen Hospital v. Knolls* (1), *Ecclesiastical Commissioners v. Merral* (2), *Attorney General v. Davey* (3) and *Gnanasambanda Pandara Sannadhi v. Vedu Pandaram* (4) was cited and distinguished. Tenancy under the Bengal Tenancy Act, and section 3, clause 3, as to the definition of "tenant" and sections 4 and 5, and Act X of 1859 (the Rent Act in force in Bengal before the Bengal Tenancy Act) were referred to. There were several kinds of tenants who had permanent interests in the property they held, but they were all only tenants, and not full proprietors; and their possession, however long, did not bar their lessor: see Bengal Tenancy Act, sections 5, 18, 20, 178 and 179; Transfer of Property Act (IV of 1882) sections 8, 108 clause (o) and 111 clause (g); and *Kally Dass Ahiri v. Monmohini Dassee* (5).

The lease of 2nd November 1896 was also void as being beyond the competence of the Mohant, and in that instance a further reason was that Raghabananda was the Mohant at the time of its execution, and he was proved to have been insane at the time and remained so until his death, and the evidence showed that, as the Subordinate Judge held, that lease was not properly executed.

Lastly, it was contended that the lease of 1860 did not include the minerals under the soil, but was only a lease for the purposes of cultivation. On its construction it was improbable that minerals and sub-soil rights were granted; no royalties were mentioned, and the "rights of various kinds" referred to would be only those *ejusdem generis*. Reference was made to *Crompton v. Jarratt* (6). Only the rights speci-

(1) (1879) L. R. 4 App. Cas. 324, 335.

(4) (1899) L. L. R. 23 Mad. 271;

(2) (1869) L. R. 4 Exch. 182, 166.

L. R. 27 I. A. 69.

(3) (1859) 4 De Gex & Jones, 136.

(5) (1897) L. L. R. 24 Calc. 440, 446 to 448.

(6) (1885) L. R. 30 Ch. 298.

fied in the lease were granted, not everything which might possibly be found in or under the land. A lease, however, permanent, did not convey missing rights unless they were definitely specified.

Sir R. Finlay, K.C., and *H. Cowell*, for the respondents, contended that there was no evidence of any valid dedication of the property in suit so as to tie it up in perpetuity; and that it was not shown on the evidence to be *debttar* property. The High Court, and, it was submitted, rightly doubted the genuineness of the sanad of 1787. But even if genuine, there was, on the construction of the sanad, nothing to show that the property granted was *debttar* and given to the idols. For all that the grant said, it might as well be a grant to the individual Mohant himself, and not a gift to the idols as the appellants contended. There was no sufficient evidence of any endowment or that the property was affected by any specified or definite trust. Reference was made to *Doorganath Roy v. Ram Chunder Sen* (1); Mayne's Hindu Law, 7th Edition, page 585, paragraph 439; 5th Edition, paragraphs 396, 397, 398; *Brojsoondery Debia v. Luchmee Koonweree* (2) as not supporting estates of a perpetual character in favour of idols.

On the construction of the lease of 1860, it was contended that it was a grant in perpetuity and for an adequate rental. Such a grant with such an annual payment by the grantee was a form of parting with landed property. It was called a *mukurari* lease and was in fact a grant in fee simple of the property conveyed, cases of *istemrari mukurari* grants were referred to showing that such grants could not be resumed at will, and that twelve years' adverse possession barred a suit to recover the property granted: *Tulshi Pershad Singh v. Ram Narain Singh* (3), *Bejoy Chunder Banerjee v. Kali Prosonno Mookerjee* (4) and *Himmatt Bahadoor v. Sooneet Koor* (5).

(1) (1876) L.L.R. 2 Calc. 341, 345, 348; (3) (1885) L.L.R. 12 Calc. 117, 129;
L.R. 4 I.A. 52, 54, 56. L.R. 12 I.A. 205, 213, 214.

(2) (1873) 15 B.L.R. 176, 178 (note). (4) (1878) I.L.R. 4 Calc. 327, 329,
330.

(5) (1871) 15 W.R. 349, 350, 351.

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(2) (1869) L. R. 4 Exch. 162, 166.

(3) (1859) 4 Do Cex & Jones, 136.

(4) (1899) L. L. R. 23 Mad. 271;

L. R. 27 I. A. 69.

(5) (1897) L. L. R. 24 Calc. 410, 416
to 418.

(6) (1855) L. R. 30 Ch. 293.

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(1) (1876) I.L.R. 2 Calc. 341, 345, 348; (3) (1885) I. L. R. 12 Calc. 117, 129;
L. R. 4 I. A. 52, 54, 56. L. R. 12 I. A. 205, 213, 214.

(2) (1873) 15 B. L. R. 176, 178

(4) (1878) I. L. R. 4 Calc. 327, 329,
330.

(note).

(5) (1871) 15 W. R. 549, 550, 551.

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As to limitation it was contended that the suit was barred by article 134 of Schedule II of the Limitation Act, 1877. The defendants were "purchasers" under that article, and "assigns for valuable consideration" within the meaning of those words in section 10 of the Limitation Act; and they and their predecessors in title had held adverse possession of the property from the date of the execution sale, 14th December 1877, and the rights of the appellants, if any, had become extinguished under section 28 of that Act. Reference was made to *Gnana-sambanda Pandara Sannadhi v. Velu Pandaram* (1). The fact that there was a rent charge, which was paid all along, made no difference. The decision in the case of *President and Governors of Magdalen Hospital v. Knotts* (2) was opposed to those in *Attorney General v. Davey* (3) and *President, &c., of College of St. Mary Magdalen, Oxford v. Attorney General* (4).

It was also contended that the lease of 1860 on its true construction granted the rights to the minerals in and under the soil: the lease after reciting what was specifically granted concluded with the words, "and all rights of various kinds" which were large enough to include mineral rights: and that by the lease of 1896 the respondents acquired a valid title to the five bighas which had been excepted from the grant of 1860.

DeGruyther, K.O., in reply, contended that the idols were the beneficiaries, and the Mohant as Manager of the endowment applied the proceeds of the property to the support of the idols, referring to Mayno's Hindu Law, 7th Edition, page 582; *Manohar Ganesh v. Lakhmiram Gorindram* (5); *Sathianama Bharati v. Saravanabagi Ammal* (6); *Mahomed v. Ganapati* (7); *Delroos Banoo Begum v. Ashgur Ally Khan* (8); *Doorganath Roy v. Ram Chunder Sen* (9); *Prosunno Kumari Debya v. Golab Chand Baboo* (10); and the Indian Trusts Act (II of 1882). Section 10 of the Limitation Act had no application

(1) (1899) L. L. R. 23 Mad. 271, 279;

L. R. 27 L. A. 69, 70.

(2) (1879) L. R. 4 App. Cas. 324.

(3) (1832) 4 DeGex & Jones, 136.

(4) (1837) 6 H. L. C. 159.

(5) (1857) L. L. R. 12 Bom. 247, 263.

(6) (1894) L. L. R. 18 Mad. 286, 274.

(7) (1882) L. L. R. 13 Mad. 277, 280.

(8) (1875) 15 B. L. R. 167.

(9) (1876) L. L. R. 2 Calc. 341, 347;

L. R. 4 L. A. 52, 55.

(10) (1875) L. R. 2 L. A. 145, 162.

to the present case; there was no adverse possession and therefore *Bejoy Chunder Banerjee v. Kally Prosenno Mookerjee* (1) and *Himmatt Bahadoor v. Soonect Koor* (2) were not applicable. The distinction between a lease in perpetuity and a sale was clear from the decision in *Kally Dass Ahiri v. Monmahini Dassce* (3).

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The judgment of their Lordships was delivered by

July 30.

SIR ANDREW SCOBLE. The subject-matter of this litigation is a mouzah called Gorfalbari, in the district of Manbhum, and the main questions for consideration are, first, whether the mouzah is *debuttar* or *dewattar* property, and, secondly, whether, assuming it to be so, the Mohant of the endowment for the time being had power to grant a *mokurari pottah*, or permanent lease, of it.

The relevant facts may be shortly stated. In the village of Achkoda is the shrine of two Hindu idols, known as Raghunath Jiu and Durga Mata, served by a family of Goswamis, among whom the office of Mohant has descended, for more than a century, by the rule of lineal primogeniture. In 1787, one Bichitrananda was Mohant, and the origin of the title to the mouzah is a sanad, dated on the 23rd December in that year, which is in the following terms:—

To the remembered and abode of all blessings, Sri Bichitrananda Mohant Goswami, of good character.

This deed of *pottah* of *debuttar* property is executed to the following effect.

Being in sound health and easy mind, I do grant to you by way of lakheraj *debuttar* the entire mouzah Gorfalbari, in pergunnah Pandra, together with all bills, jhils, waste and danga lands, jungles and culturable lands and whatever exists thereon. By bestowing your blessing on us, you do enjoy and possess the same with fresh felicity. If I or any of my heirs ever disposes you, the dispossession shall be ineffectual.

It was contended on behalf of the respondents that, although the grant was to the Mohant, and "by way of lakheraj *debuttar*," there was no complete or specific dedication of the mouzah to the service of any idol, but that the gift was to the

(1) (1876) L. L. R. 4 Calc. 327.

(2) (1871) 15 W. R. 542.

(3) (1897) L. L. R. 24 Calc. 440.

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time of his death. The High Court say that "he was apparently insane in 1892 and again in 1897, but the oral evidence as to his being insane in 1896, at the date of the lease, is far from convincing. . . . The better view seems to us that he was not insane in 1896." Their Lordships can find no satisfactory evidence of any lucid interval between the periods when he was undoubtedly a lunatic, and as his mental incapacity arose from an excessive habitual use of ganja, it is extremely unlikely that such an interval should have occurred. They agree with the Subordinate Judge's finding upon this point.

It remains to deal with the question of limitation, upon which the learned Judges of the High Court have rested their decision. The article in the Limitation Act applicable to this case is article 134, by which a period of twelve years from the date of purchase is fixed for suits "to recover possession of immoveable property conveyed or bequeathed in trust or mortgaged and afterwards purchased from the trustee or mortgagee for a valuable consideration." The operation of this article is controlled by section 10 of the Act, which provides that—

No suit against a person in whose property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property shall be barred by any length of time.

"Statutes of Limitation, like all others, ought to receive such a construction as the language, in its plain meaning, imports": *Luchmee Buksh Roy v. Runjeet Ram Panday* (1). Now, what is the plain meaning of the words "purchased for a valuable consideration"? They mean that the ownership of the property sold has been absolutely transferred from the vendor to the purchaser in consideration of a price paid or secured by the purchaser to the vendor. Sir Robert Finlay, in his able argument for the respondents, contended that a *mokurari* lease is tantamount to a conveyance in fee simple, and that the lessee must therefore be treated as a purchaser within the meaning of the Limitation Act. But the distinction between the two transactions has been well pointed out by Jenkins, J., in his judgment in the case of *Kally Dass Ahiri v.*

Monmohini Dassee (1). "Because at the present day," says the learned Judge, "a conveyance in fee simple leaves nothing in the grantor, it does not follow that a lease in perpetuity here has any such result. . . . The law of this country does undoubtedly allow of a lease in perpetuity . . . A man who, being owner of land, grants a lease in perpetuity carves a subordinate interest out of his own, and does not annihilate his own interest. This result is to be inferred by the use of the word *lease*, which implies an interest still remaining in the lessor." He held, therefore, that, whether the Transfer of Property Act applied or not, such a lease is forfeitable, notwithstanding that it is permanent. In this opinion their Lordships concur, and it follows that they are unable to give to the Limitation Act the wider interpretation adopted by the High Court, and to treat the lessee as a purchaser under article 134 of the Act. The purchaser must be the purchaser of an absolute title.

For these reasons their Lordships are of opinion that the leases under which the respondents claim were valid only during the life-time of the Mohant by whom they were granted, and they will humbly advise His Majesty that this appeal ought to be allowed, the judgment of the High Court set aside with costs, and the decree of the Subordinate Judge restored.

The first and fourth respondents, who resisted this appeal, must pay the costs of it.

Appeal allowed.

Solicitors for the appellants : *Louless & Co.*

Solicitors for the respondents : *Morgan, Price & Menburn.*

(1) (1897) L. L. R. 24 Calc 440, 447.

J. V. W.

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CRIMINAL APPELLATE.

*Before Sir Lawrence H. Jenkins, K.O.I.E., Chief Justice, and
Mr. Justice Caspersz.*

ASHRUF ALI

v.

EMPEROR.*

*Opium, illegal possession of—Opium Act (I of 1878) s. 9 (c)—Possession of
railway receipt for an undelivered parcel of contraband opium.*

The possession of a railway receipt relating to an undelivered parcel of contraband opium lying in a railway office, under circumstances showing knowledge of its contents, constitutes possession of the opium within section 9, clause (c) of the Opium Act.

Kashi Nath Bania v. Emperor (1) discussed and followed.

THE appellant Ashruf Ali was tried and convicted by the Chief Presidency Magistrate, on the 22nd April 1909, under Act I of 1878, sections 9 and 10 of being in illegal possession of opium, and sentenced to a fine of Rs. 500 and in default to six months' rigorous imprisonment.

On 7th February 1909, the appellant, it was found, gave one Yad Ali a railway receipt for a parcel despatched from Madhubani to Calcutta, and asked him to send a trustworthy coolie to take delivery of it at the Howrah station. The receipt, which was dated the 4th February, purported to bear the names of Bachoo as consignor and Emam Sarif as consignee, and described the contents of the package covered by it as "one tin of ghee." It bore an endorsement in favour of a coolie, named Durgai, signed by one Akhin Sarif. On the following day the appellant went to Yad Ali and inquired about the parcel, and was informed by the latter that the coolie went to the Howrah station but did not find it there, and that he had gone to the East Indian Railway Parcels Office in Chowringhee Road for it.

* Criminal Appeal No. 484 of 1909, against the order of T. Thornhill, Chief Presidency Magistrate, Calcutta, dated April 23, 1909.

(1) (1905) I. L. R. 32 Cal. 557.

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In the meantime an Excise Sub-Inspector, upon receiving certain information, went to the Parcels Office and saw Durgai there with the receipt awaiting delivery. He took the receipt from him and obtained delivery of the package which, on being opened, was found to contain 20 seers of contraband opium. The Excise Officer then arrested Durgai who stated that he had got the receipt from Yad Ali, whereupon they went to the latter's shop and questioned him, and he immediately admitted having given the receipt to the coolie, but explained that he had received it from the appellant Ashruf. The appellant on being asked by the Excise Sub-Inspector about the receipt denied all knowledge of it, and contradicted the story of Yad Ali, but he was arrested and put on trial before the Chief Presidency Magistrate. It was contended for the defence that Yad Ali was the real culprit, and that the evidence of the witnesses who corroborated his story was false and concocted, but the Magistrate found possession of the receipt with the appellant and convicted him.

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Mr. Asghur (Babu Manmatha Nath Mookerjee with him), for the appellant, argued on the facts that Yad Ali, who had been previously convicted under the Opium Act, was the guilty party, and that he now attempted to throw the blame on the appellant. The Court must determine the nature of the possession in the case: *Crown v. Kyte* (1). The case of *Kashi Nath Bania v. Emperor* (2) is distinguishable, as the accused there was the consignee himself and the receipt was discovered in his box. In this case the receipt was not found with Ashruf nor did he ever have possession of the opium.

Mr. Orr, for the Crown. The view of the facts taken by the Magistrate is correct. The receipt was in the appellant's possession, and his denial of it proves his knowledge of the contents of the parcel. He is, therefore, liable under the law as being in possession of the opium: *Kashi Nath Bania v. Emperor* (2).

(1) (1882) I. L. R. 9 Calc. 223.

(2) (1905) I. L. R. 32 Calc. 557.

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JENKINS C.J. AND CASPERSZ J. On the facts we are in agreement with the learned Magistrate, for we hold with him that the accused was in possession of the railway receipt. The question then arises whether that constitutes possession of the opium to which the railway receipt relates, so as to be an offence within section 9 of the Opium Act (I of 1878). If unfettered by authority, I should have been disposed to hold that there was no such possession, for, as I read the Act, it relates to possession of opium, and not of a receipt for the opium. However, there is a decision of this Court by which we are bound, *Kashi Nath Bania v. Emperor* (1), in which, on facts not fairly distinguishable from the present, it was held that possession of the railway receipt was possession of opium within the meaning of the section. It appears to me that this decision overlooks the distinction between "possession" and the "right to possession." But there the decision stands, and we are bound by it. We, therefore, dismiss this appeal.

L. M. M.

Appeal dismissed.

(1) (1905) I. L. R. 32 Calc. 557.

MATRIMONIAL JURISDICTION.

Before Mr. Justice Harington.

BOWEN v. BOWEN.*

1909
 ug. 10.

Divorce—Alimony pendente lite, application for, after decree nisi—Indian Divorce Act (IV of 1869) s. 36.

Notwithstanding a decree nisi for dissolution of marriage, on the ground of the wife's adultery, the Court has power, under section 36 of the Indian Divorce Act, to order alimony *pendente lite* for the period between decree nisi and decree absolute.

Dunn v. Dunn (1) considered.

This was an application by the wife, against whom a decree nisi (2) for dissolution of marriage had been made, for an order for alimony, until the decree should be made absolute.

On the 7th January 1909, Mr. Bowen filed a petition for dissolution of marriage on the ground of his wife's adultery,

* Application in Original Civil Suit No. 1 of 1909.

(1) (1885) L. R. 13 P. D. 91.

(2) (1909) I. L. R. 36 Calc. 874.

and on the 14th June 1909, Harington J. pronounced the decree *nisi* (1).

Mr. Bowen was a berthing master in the employment of the Commissioners of the Port of Calcutta, with an income of about Rs. 350 per month. Since the institution of the suit, by a private arrangement between the parties, the husband had made the wife an allowance at the rate of Rs. 100 a month for the months of January and February, and thereafter at the rate of Rs. 70 a month. On the 5th July 1909, Mr. Bowen tendered the sum of Rs. 35 as the amount due up to the date of the decree *nisi*, and refused to make any further allowance.

Mr. Asghur, for the applicant. Under section 36 of the Indian Divorce Act the wife may present a petition for alimony pending the suit, and the alimony shall continue until the decree is made absolute. Now the *lis* does not terminate with the decree *nisi*. Hence an application for alimony can be made after decree *nisi*: *Ellis v. Ellis* (2), *Foden v. Foden* (3), *Thomas v. Thomas* (4). The Indian Divorce Act does not deprive a guilty wife of alimony: *Thomas v. Thomas* (4). See Rattigan on Divorce, page 204.

Mr. Stokes, for the opposite party. In *Thomas v. Thomas* (4), alimony was allowed to the guilty wife only up to the pronouncement of decree *nisi*. It has been the uniform practice of the Courts in England to order a discontinuance of alimony after the wife's adultery has been proved *Dunn v. Dunn* (5). Section 30 of the Indian Divorce Act does not contemplate an application for alimony being made after decree *nisi*. Under that section, if an order for alimony had been made before decree *nisi*, it would continue until the decree was made absolute.

Cur. ad. vult

HARINGTON J. This is an application by the wife against whom a decree *nisi* for dissolution of marriage has been made for alimony until the decree is made absolute.

(1) (1909) 1 L. R. 56 Calo 574.

(3) [1894] P. 307.

(2) (1883) L. R. 8 P. D. 168.

(4) (1896) L. R. 23 Cal. 211.

(5) (1848) L. R. 13 P. D. 21.

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 J.

The husband has tendered the amount due up to the decree *nisi* and says that, inasmuch as the wife has been found guilty of misconduct, she has forfeited her right to receive any alimony subsequent to the decree *nisi*.

Alimony has been paid by the husband to the wife since the institution of the suit: that payment was made in pursuance of a private arrangement between the parties, no application was made in Court in respect of it.

The husband relies on the case of *Dunn v. Dunn* (1), in which it was held in England that where alimony *pendente lite* had been granted to a wife in a petition for divorce the right to such alimony ceased upon the wife's being found guilty of adultery.

But in this country the period during which alimony is payable is regulated by section 36 of the Divorce Act, which provides that it shall continue in the case of a decree for dissolution of marriage until the decree is made absolute. This provision, therefore, makes the law as laid down in *Dunn v. Dunn* (1) inapplicable in this country. Had alimony been granted it must by the express words of the statute have been continued to be payable until the decree is made absolute.

The decree *nisi* then under Indian law is no ground for depriving the wife of her alimony, and if it be no ground for depriving a wife of alimony, it appears to me equally to be no ground for refusing a wife the alimony which would otherwise be granted to her. The Indian Divorce Act contemplates the payment to the wife of alimony as long as she is in law a wife. Mrs. Bowen is still the wife of Mr. Bowen and should therefore be supported until she ceases, under a decree absolute, to fill that position. The parties are agreed that alimony, if payable, shall be at the rate of Rs. 70 a month.

The result is that the application must be granted with costs on scale 2.

2. c

Application allowed.

Attorney for the applicant: G. K. Ghose.

Attorneys for the opposite party: Pugh & Co.

ORIGINAL CIVIL.

Before Mr. Justice Fletcher.

PRAKASH KUMAR MUKERJI

v.

HARVEY.*

1909

July 26.

Damages, suit for—Dogs likely to bite without provocation—Injury by Dogs at a public Recreation-ground—Liability of Owner of Dogs—Scienter.

The defendant's dogs which to the knowledge of his servant having the charge of such dogs were likely to bite people without provocation, were taken by such servant to a public recreation-ground. The plaintiff, a child of seven years of age, became frightened at the dogs and cried whereupon the dogs attacked and bit him severely:—

Held, that the defendant was liable in damages to the plaintiff.

Barnes v. Lucile, Ltd (1) distinguished.

ORIGINAL SUIT.

THE facts are briefly as follows. The plaintiff, who was a child of about seven years of age, went out in company of his servant to the Ballygunge maidan, a public recreation-ground, where numerous children congregated every day. Seeing a number of large dogs at a little distance, the boy got frightened and cried. It was alleged that thereupon the dogs became excited and, two of these being loose, ran for the boy, while three others also attacked the boy after breaking away from their keeper who was holding them in chains. These dogs belonged to the defendant, Mr. A. D. F. Harvey, and the evidence was that the keeper told the servant not to bring the child any nearer. The boy having been severely bitten was taken by his parents for treatment to the Pasteur Institute at Kasauli. This was done as a precautionary measure, although there was nothing to show that the dogs were rabid at the time. The plaintiff afterwards filed this suit for damages.

Mr. H. D. Bose and Mr. S. K. Mullick, for the plaintiff.

Mr. H. Stokes and Mr. Hyam, for the defendant.

* Original Civil Suit No. 307 of 1902.

(1) (1907) 23 T. L. R. 352.

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case the only act of provocation seems to be that the plaintiff cried on the Ballygunge maidan, and I think he was quite as justified in so doing as the defendant was in bringing five large dogs there.

Having taken this view, it is not necessary to consider the evidence of Oori saib who has stated that he was bitten by the dogs, though I must take exception to Mr. Stokes' statements that no reliance is to be put on the evidence of such men. In some cases I think even the evidence of saibis may be true.

I think there is sufficient evidence to show that the dogs were likely to bite mankind without provocation.

There now remains the question of damages and the evidence of the plaintiff's father is that he has spent from Rs. 500 to Rs. 600 on medical attendance and travelling expenses. Mr. Stokes seemed at first inclined to challenge the fact as to whether it was proper to go at once to Kasauli. No one can have any doubt, but that in the circumstances the plaintiff was justified in going at once to Kasauli. Mr. Stokes, however, has abandoned this attitude. The plaintiff is, therefore, entitled to recover his expenses and those incurred by his father and mother, as having regard to his age they were necessary persons to proceed with him to Kasauli. The other question is as to the amount of general damages and there is very little evidence before me on the point. The plaintiff has not been as well as he was before the accident, but there is no evidence to show that this is the result of being bitten, and I think it will meet the case if I give the plaintiff a solatium of Rs. 400 for the pain and suffering he has undergone and a further sum of Rs. 600 to reimburse his father, his costs and expenses of travelling and medical necessities. I, therefore, give judgment for the plaintiff for Rs. 1,000, together with costs on scale No. 2.

Judgment for plaintiff

S. C. 2.

Attorneys for the plaintiff: *Leslie & Hinds.*

Attorneys for the defendant: *Orr, Dignam & Co.*

